SUPREME COURT OF THE UNITED STATES.

No. 227.

FREDERICK SCHUCHARDT AND FREDERICK C. GEBHARD, PL'FFS IN ER.

vs.

PHILIP ALLEN, PHILLIP ALLEN, JR., AND CHARLES B. ALLEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Clerk's certificate	1	1
Declaration	2	1
Answer	13	5
Trial	14	5
Judgment	14	5
Bill of exceptions	16	6
Deposition of R. H. Green	17	6
" W. H. Taylor	25	11
" S. Low	25	11
" J. McCarthy	26	11
" J. R. Chilton	27	12
" I. Deck	28	13
" E. N. Kent	29	13
" R. A. Fisher	29	13
" P. Allen	30	14
" F. Schuchardt	30	14
" C. A. Van Renterghem	34	16
" Wm. Voute	38	19
" A. Mendel	44	23
" M. Rutemeyer	50	26
" H. Luden	52	28
Instructions prayed for	54	28
Writ of error	58	29
Bond	61	30
Citation	66	32

1 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York in the southern district of New York, in the second circuit, this second day of June, in the year of our Lord one thousand eight hundred and sixty-two, [SEAL.] and of the independence of the said United States the eighty-sixth.

KENNETH G. WHITE, *Clerk.*

2 United States circuit court southern district of New York, in the second circuit.

Pleas before the United States circuit court for the southern district of New York, in the second circuit, at the city of New York, of the term of October, in the year of our Lord one thousand eight hundred and sixty-one.

Witness: SAMUEL NELSON, *Esq., Justice.*
KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, in October term, in the year of our Lord one thousand eight hundred and fifty-six, before the justices of this court, at the city of New York, came Philip Allen, Phillip Allen, jr., and Charles B. Allen, citizens of the State of Rhode Island, by George S. Strong, their attorney, and brought into the said court their certain declaration against Frederick Schuchardt and Frederick Gebhard, citizens of the State of New
3 York, which declaration follows in these words, that is to say:

For that the said plaintiffs heretofore, to wit, on the seventeenth day of April, in the year of our Lord one thousand eight hundred and fifty-six, at Providence, in the State of Rhode Island, to wit, at the city of New York, in the State of New York, at the special instance and request of the said defendants, bargained with the said defendants to buy of them a certain quantity of Dutch madder, to wit, one hundred casks, containing a large quantity, to wit, one hundred and sixty thousand pounds of Dutch madder, at and for a certain price or sum, to wit, the price or sum of eleven and one-quarter cents per pound, payable in promissory notes, payable in six months from the date, and the said defendants then and there falsely and fraudulently warranting the said

Dutch madder to be a prime article, then and there sold the said Dutch madder for the said price of eleven and one-quarter cents per pound, payable as aforesaid, amounting altogether to a large
4 sum, to wit, the sum of eighteen thousand dollars, which was then and there paid by the said plaintiffs to the said defendants in manner aforesaid. Whereas, in truth and in fact, the said Dutch madder was, at the time of the said warranty and sale thereof, not a prime article, but was an inferior, base, adulterated article. And the said plaintiffs, in fact, say that the said defendants by means of the premises, on the day and year aforesaid, to wit, at the city of New York, aforesaid, falsely and fraudulently deceived the said plaintiffs on the sale of the said Dutch madder, as aforesaid.

And whereas, also, heretofore, to wit, on the day and year aforesaid, at Providence, aforesaid, to wit, at the city of New York, aforesaid, the said plaintiffs, at the special instance and request of the said defendants, bargained with the said defendants to buy of them a certain other quantity of Dutch madder, to wit, one hundred casks, containing a large quantity, to wit, one hundred and sixty thousand pounds of Dutch madder, at and for a certain price or sum, to wit, the price or sum of eleven and one-quarter cents per pound, payable in promissory notes, payable in six months from the date, and
5 the said defendants, by then and there falsely and fraudulently warranting the said last-mentioned Dutch madder to be pure and unadulterated, then and there sold the same for the said price or sum of eleven and one-quarter cents per pound, payable as aforesaid, amounting altogether to a large sum, to wit, the sum of eighteen thousand dollars, which was then and there paid by the said plaintiffs to the said defendants in manner aforesaid. Whereas, in truth and in fact, the said last-mentioned Dutch madder was, at the time of the said warranty and sale thereof, not pure and unadulterated, but was impure and adulterated. And the said plaintiffs, in fact, say that the said defendants, by means of the premises, then and there falsely and fraudulently deceived the said plaintiffs on the sale of the said last-mentioned Dutch madder, as aforesaid.

And whereas, also, heretofore, to wit, on the day and year aforesaid, at Providence aforesaid, to wit, at the city of New York aforesaid, the said plaintiffs, at the special instance and request of
6 the said defendants, bargained with the said defendants to buy of them a certain other quantity of Dutch madder, to wit, one hundred casks, containing a large quantity, to wit, one hundred and sixty-nine thousand pounds of Dutch madder, at and for a certain price or sum, to wit, the price or sum of eleven and one-quarter cents, per pound, payable in promissory notes, payable in six months from the date; and the said defendants, by then and there falsely and fraudulently warranting the said last-mentioned Dutch madder to be good merchantable Dutch madder, then and there sold the same for the said price or sum of eleven and one-quarter cents per pound, payable as aforesaid, amounting altogether to a large sum, to wit, the sum of eighteen thousand dollars, which was then and there paid by the said plaintiffs to the said defendants in manner aforesaid.

Whereas, in truth and in fact, the said last-mentioned Dutch madder was, at the time of the said warranty and sale thereof, not good merchantable Dutch madder.

And the said plaintiffs, in fact, say that the said defendants, by means of the premises, then and there falsely and fraudulently
7 deceived the said plaintiffs on the sale of the said last-mentioned Dutch madder, as aforesaid.

And whereas, also, on the day and year aforesaid, at Providence aforesaid, to wit, at the city of New York aforesaid, the said plaintiffs carried on and were engaged in the business of calico printers, and as such required for their use, and were accustomed to use, in their said business, Dutch madder; all of which premises were then and there well known to the said defendants. And whereas the said plaintiffs then and there, at the special instance and request of the said defendants, bargained with the said defendants to buy of them a certain quantity of Dutch madder, to wit, one hundred casks, containing a large quantity of the same, to wit, one hundred and sixty thousand pounds thereof, at and for a certain price or sum, to wit, the price or sum of eleven and one-quarter cents per pound, to be paid in promissory notes, payable in six months from the date; and the said defendants, by then and there falsely and fraudulently representing the same to be fit and proper for use in the said business of the said plaintiffs, they the said defendants then and there
8 well knowing that the same was bought by the said plaintiffs for the sole purpose of being used in their said business, then and there sold the same to the said plaintiffs, at and for the price aforesaid, which was then and there paid to the said defendants by the said plaintiffs; whereas, in truth and in fact, the said last-mentioned Dutch madder was, then and there, not at all fit or proper to be used by the said plaintiffs in their said business. And the said plaintiffs, in fact, say that by means of the premises the said defendants then and there falsely and fraudulently deceived the said plaintiffs on the sale of the said last-mentioned Dutch madder, as aforesaid. And whereas, on the day and year aforesaid, at Providence aforesaid, to wit, at the city of New York aforesaid, the said plaintiffs, at the special instance and request of the said defendants, bargained with the said defendants to buy of them a certain other quantity of Dutch madder, to wit, one hundred casks, containing a large quantity, to wit, one hundred and sixty thousand pounds
9 of Dutch madder, at and for a certain price or sum, to wit, the price or sum of eleven and one quarter cents per pound, payable in six months from the date.

And the said defendants by then and there falsely, fraudulently, and deceitfully pretending and representing to the said plaintiffs that the said last-mentioned Dutch madder was a prime article, then and there sold the same to the said plaintiffs at and for the price or sum aforesaid, which was then and there paid in manner aforesaid by the said plaintiffs to the said defendants; whereas, in truth and in fact, the said Dutch madder was not a prime article, but was an inferior, base, adulterated article, as the said defendants, at the time of

making the said false and deceitful representations, well knew; and the said plaintiffs further say that the said defendants, by means of the last-mentioned premises, on the day and year aforesaid, at Providence aforesaid, to wit, at the city of New York aforesaid, falsely and fraudulently deceived the said plaintiffs in the sale of the last-mentioned Dutch madder, as aforesaid.

And whereas, also, on the day and year aforesaid, at Providence aforesaid, to wit, at the city of New York aforesaid, the said plaintiffs, at the special instance and request of the said defendants, bargained with the said defendants to buy of them a certain other quantity of Dutch madder, to wit, one hundred casks, containing a large quantity, to wit, one hundred and sixty thousand pounds of Dutch madder, at and for a certain price or sum, to wit, the price or sum of eleven and one-quarter cents per pound, payable in promissory notes, payable in six months from date.

And the said defendants, by then and there falsely, fraudulently, and deceitfully pretending and representing to the said plaintiffs that the said last-mentioned Dutch madder was pure and unadultered, then and there sold the same to the said plaintiffs at and for the sum or price aforesaid, which was then and there paid in manner aforesaid by the said plaintiffs to the said defendants; whereas, in truth and in fact, the said Dutch madder was not pure and unadulterated, but was impure and adulterated, as the said defendants, at the time of making the said false and deceitful representations, well knew; and the said plaintiffs further say that the said defendants, by means of the last-mentioned premises, on the day and year aforesaid, at Providence aforesaid, to wit, at the city of New York aforesaid, falsely and fraudulently deceived the said plaintiffs in the sale of the last-mentioned Dutch madder, as aforesaid.

And whereas, also, on the day and year aforesaid, at Providence aforesaid, to wit, at the city of New York aforesaid, the said plaintiffs, at the special instance and request of the said defendants, bargained with the said defendants to buy of them a certain other quantity of Dutch madder, to wit, one hundred casks, containing a large quantity, to wit, one hundred and sixty thousand pounds of Dutch madder, at and for a certain price or sum, to wit, the price or sum of eleven and one-quarter cents per pound, payable in promissory notes, payable in six months from date.

And the said defendants, by then and there falsely, fraudulently, and deceitfully pretending and representing to the said plaintiffs that the said last-mentioned Dutch madder was good, merchantable Dutch madder, then and there sold the same to the said plaintiffs, at and for the sum or price aforesaid, which was then and there paid in manner aforesaid, by the said plaintiffs to the said defendants; whereas, in truth and in fact, the said Dutch madder was not good, merchantable Dutch madder, but was, as the said defendants at the time of making the said false and deceitful representations, well knew; and the said plaintiffs further say that the said defendants, by the means of the last-mentioned premises, on the day and year aforesaid, at Providence aforesaid, to wit, at the city of New York aforesaid,

falsely and fraudulently deceived the said plaintiffs in the sale of the last-mentioned Dutch madder, as aforesaid, to the damage of
13 the said plaintiffs of thirty thousand dollars, and therefore they bring their suit, &c.

And the said defendants, by Owen & Vose, their attorneys, come and defend the wrong and injury when, &c., and say that they are not guilty of the said supposed grievances laid to their charge, or any or either of them, or of any part thereof, in manner and form as the plaintiffs have above thereof complained against them, and of this they put themselves upon the country, and the plaintiffs do the like, &c.

Therefore, to try the issue above joined between the parties, let a jury thereupon come before the judges of the circuit court of the United States for the southern district of New York, at the court-room of the said court in the city of New York, on the first Monday of April, in the year 1859, each of whom, &c., by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid there.

And because the said cause was not tried between the par-
14 ties aforesaid, and the said issue joined therein was continued to the 25th day of May, in the year last aforesaid, at which time, before the honorable Samuel Nelson, one of the judges of this court, at a stated term thereof, held at the city of New York in the southern district of New York, came as well the plaintiffs as the defendants, by their respective attorneys, aforesaid, and the jurors of the jury on this behalf summoned also came, and to try the said issue are duly chosen, tried, and sworn. And the jurors, aforesaid, on their oaths, aforesaid, do say that the said defendants are guilty of the said grievances above laid to their charge, in manner and form as the said plaintiffs have above in that behalf alleged against them. And they assess the damages of the said plaintiffs, by reason of the premises, to seven thousand three hundred and thirty-three dollars, besides the costs and charges of the said plaintiffs by them about their suit in this behalf expended, and for those costs and charges to six cents.

Therefore it is considered by the court now here that the
15 said plaintiffs do recover against the said defendants their said damages, costs, and charges, in form afore-aid assessed, and also the further sum of one hundred and fifty five $\frac{92}{100}$ dollars for the costs and charges of the plaintiffs, by them about their suit in that behalf expended by the court now here adjudged, of increase to the plaintiffs, and with their assent; which damages, costs, and charges, in the whole, amount to ($7,488 92) seven thousand four hundred and eighty-eight $\frac{92}{100}$ dollars. And the said defendant in mercy, &c.

Judgment signed this 9th December, 1861.

R. E. STILWELL, *Dep. Cl'k.*

Endorsed: U. S. circuit court. Philip Allen *et al. vs.* Frederick Schuchardt *et al.* Judgment record.

G. T. STRONG, *Pl'ff's Att'y.*

Filed Dec. 9, 1861.

16 In the United States circuit court.

FREDERICK SCHUCHARDT & FREDERICK C. GEBHARD, *ads.*
PHILIP ALLEN, PHILIP ALLEN, jr., and CHARLES B. ALLEN.

Bill of exceptions.

And afterwards, to wit, at a term of the circuit court of the United States, held at the city of New York, in and for the southern district of New York, in the second circuit, on the 25th day of May, one thousand eight hundred and fifty-nine, before the honorable Samuel Nelson, one of the associate justices of the Supreme Court of the United States, holding the said court according to the form of the statute in such case made and provided, the issue so joined between the said parties, as aforesaid, came on to be tried by a jury of the said district, for that purpose duly empannelled, good and lawful men of the said district, at which day came as well the said plain-
17 tiffs as the said defendants, by their respective attorneys, aforesaid, and the jurors of the jury empannelled to try the said issue being called also came, and were then and in the manner chosen and sworn to try the said issue; and upon the trial of the said issue the counsel for the said plaintiffs, to maintain the issues on their part, called as a witness—

Randall H. Green, who, being sworn, testified as follows:

I am in business in this city, and am employed as a broker in drugs, &c.; I am acquainted with Messrs. Philip Allen & Sons, the plaintiffs in this action, and have been in the habit of selling madder to them.

(Counsel for plaintiffs thereupon asked witness what kind of madder he had been in the habit of selling plaintiffs; to which ques-
17 tion counsel for defendants objected, and the court overruled the objection. To which ruling an exception was taken by counsel for defendants.)

Witness. The plaintiffs are calico printers, and have been engaged in that business for many years; Mr. Allen is one of our best calico printers, and has always been in the habit of using the best madder; I am a broker; I received from a young man in the employ of defendants a small bottle of madder, marked 1 to 100, said to represent one hundred casks of Dutch madder, with the injunction that it must not be opened; he left it with me; I asked him subsequently why he would not have it opened, and he replied that it was the only sample bottle which they had, and that it would deteriorate by being opened, which is the fact; the vessel with the madder was here, and as they were urgent to have it taken from the wharf, and as I was about going eastward, I said I would try and sell it, but still I was told not to have it opened; it was very handsome to look at; I went to Providence and called on the Allens; young Allen went with me to the works; he wanted to see his overseer; we met his overseer (Mr. Mc-

Carty) and the bottle was submitted to him; he thought it was
19 handsome and the conclusion was they agreed to take it; the price was named; he inquired concerning the quality; I told him I knew nothing of it, except that it came from one of our best houses; the standing of the house was the best guaranty; up to this time I do not know that I had ever seen any madder that would deteriorate by being exposed to the atmosphere, except in one case; in all other cases, within my knowledge, there was a sample bottle for every cask; the conversation carried the idea that it was very handsome madder; the price named was $11\frac{1}{4}$ cents per pound for the 100 casks, without knowing the amount contained in them; he said he would take it, and I said he should have it; the price was fixed by the defendants; the bottle was not opened; my orders were not to open it; the ship containing the madder had not arrived when the bottle was first brought to me; I think that the notes for the madder were sent to me; the bill was sent on by me on the 28th April, 1856, and
20 the shipment of the goods was finished on the same day; on the 1st May the plaintiffs' notes for the goods were delivered to me; the amount of them was $17,998; I acknowledged their receipt on the same day; on the 30th May, plaintiffs requested me to send them the sample bottle, and I accordingly sent it to them by express, as my books say; I had not left it with them; some time afterwards the plaintiffs wrote to me, and I communicated to the defendants the fact that the madder sold would not answer the purposes of the plaintiffs by letter, of which I have here a copy, dated June 6th, 1856.

NEW YORK, *June 6th*, 1856.

Messrs. SCHUCHARDT & GEBHARD:

GENTLEMEN: We have letters from Messrs. P. Allen & Sons, of Providence, and the samples of which the writer had conversation with you this a. m., in relation to the 100 casks madder sold them, Nos. 1 to 100. They say it has much sand in it, and they have sent us samples, as they have found it adulterated a large percentage.

They are having it tried by different parties so as to ascertain to what extent the mixture is. As it is, they think it will not answer for their use, and ask how to return it. We write this so as to have a record on our books of the facts.

We are very truly yours,

(Signed) RANDALL H. GREENE & SONS.

They answered that they did not wish to do anything about it, but that they would write to their principals in Holland; they had sold it as agents, and had already remitted the proceeds to their principals; I received another communication from defendants, which I communicated to the plaintiffs.

(Witness here produced and read a copy of his letter to plaintiffs, dated June 16th, 1856, which is as follows:)

NEW YORK, *June 16th*, 1856.

MESSRS. PHILLIP ALLEN & SONS, *Providence:*

21 We have yours of 14th inst. The writer has called on S. & Gebhard, this a. m., for answer, since they got of us the certificates of the chemist. Mr. G. says they have sent out the statements per the steamer, and will wait answer. We notified them that you would be willing to leave the matter to the Chamber of Commerce, or other parties, as would best suit them. They did not seem willing to leave it to any one, but would wait the answer from their friends, the consignors.

We are very truly yours,

(Signed) RANDALL H. GREENE & SONS.

This letter contains a correct statement of my interview with the defendants, to which it refers; I received from the plaintiffs samples of the madder taken from the casks, and took them for analysis to Drs. Chilton, Deck, and Kent, and I communicated the result of the analysis to both the plaintiffs and the defendants—

Dr. Deck reported	38	per cent.	of adulteration.
" Chilton,	32	"	"
" Kent,	37	"	"

Being *cross-examined*, witness said: I have had business transactions with plaintiffs for at least forty years; I bought extensively for them; I had no standing order to buy madder for them, at a price not to exceed eleven cents; I cannot tell the name of the defendants' young man who called on me; I recollect that he was somewhat cross-eyed; he called on me as a broker, in the usual way; the sample bottle was in the usual form of such samples; it is usual to have one for every cask, but there was but one; it had a ground stopper, and that was covered with a piece of skin, fastened over the top; when the bottle is opened the madder imbibes moisture and changes the color, and it no longer fairly represents the bulk from which it is taken; I was informed that this was the only sample bottle in the possession of defendants, and I never saw any other in their possession; to the best of my knowledge, I never made an application to divide the sample; I brought the bottle back with me from Providence; I told plaintiffs that they must not open the bottle because there was no other sample, and I cannot
22 say that any objection was made; Mr. Allen was very apt to take what I said about it; subsequently, I was applied to for the sample bottle, and sent it on; I have never seen it since; I have often been asked for it, but cannot find it; there was no objection to my giving the sample bottle to the plaintiffs after the sale; it then belonged to them; I promised to bring back the bottle from Providence; I did so, and afterwards sent it back to Providence; I did not ask permission to surrender bottle after sale; I first knew of the arrival of the vessel, containing the madder, a few days after my return from Providence, and I immediately took possession of the madder for the plaintiffs.

A paper, purporting to be the memorandum of the sale in question, was here exhibited to witness, who said: This is a note of the sale

sent by me to the defendants; it is the written memorandum of the sale, and copied from an entry of a sale made by me, in my broker's book:

No. 388. NEW YORK, *April 17th*, 1856.

Sold to Phillip Allen & Sons, on account of Schuchardt & Gebhard, 100 casks Dutch madder, at 11¼, 6 months, ○G 1 to 100, per *Mississippi*.

By your obedient servants,
(Signed) RANDALL H. GREENE & SONS.

No responsibility taken, unless by special agreement.

There was a bill of the goods in question rendered to me on the 28th April, which I forwarded to plaintiffs.

A paper, purporting to be a copy of the bill in question, was here shown to witness, who says thereon: This is a copy of the bill.

On being *cross-examined* in regard to this paper, by counsel for plaintiffs, witness says: I don't think that I looked at the original bill; I cannot say, of my own knowledge, that this is a copy, but I think it is; I think that it was Mr. Schuchardt I saw in my interview with defendants, on 6th June, 1856; I think that the answer I received to the proposition made for an arbitration was not in writing.

Counsel for defendants here called for defendants' letter to plaintiffs, dated August 7th, 1856, which was thereupon produced by the defendants, and read:

23 NEW YORK, *Aug. 7th*, 1856.

Messrs. PH. ALLEN & SONS, *Providence, R. I.*:

GENTLEMEN: Your favor of the 1st inst is to hand. In reply we would say that we are not authorized by our principals to submit the matter to arbitration, they denying any liability whatever for the reasons assigned in our letter of the 24th ult.

We are desirous of seeing this matter settled in one way or the other, and as the parties whom we represent decline most positively to make any deduction, we shall be pleased to hear that you have withdrawn your claim, or if you desire to test your rights in the matter that you at once bring suit against our principals.

We suggest this course, as we naturally feel a disposition to have all differences arising out of the transactions which we have conducted as agents adjusted in the most prompt manner.

You will please understand that, having, in the usual course of business, fully accounted to our principals for the amount of sales, without having received notice of any claim or reclamation from you, we shall feel justified in insisting upon our rights, as simple agents in this transaction. Yours, respectfully,
(Signed) SCHUCHARDT & GEBHARD.

Dr. Deck's analysis of the madder in question I get from the paper before me.

A letter from the witness to the defendants, dated 11th June, 1856, was here read in evidence:

NEW YORK, *June 11th*, 1856.

Messrs. SCHUCHARDT & GEBHARD:

GENTLEMEN: We have this day received from Isaiah Deck, chemist, a certificate which reads thus:

"RANDALL H. GREENE & SONS:

"GENTLEMEN: The sample of madder given me for analysis contains 34 per cent of impurities, of which 16 per cent. is sand.

"Very respectfully,

"ISAIAH DECK, *M. D.*,

"*And Analyical Chemist, &c.*"

We have written this to Messrs. P. Allen & Sons, this day.

We are very truly yours,

RANDELL H. GREENE & SONS.

24 Dr. Kent's analysis thereof I get from memory; there are different qualities of Dutch madder, but they are all known by the one name of "Dutch madder;" there are the *mull, little ombro, ombro,* and *crops;* the best quality known is the *crops,* and after that the *ombro;* this was not sold as *crops;* it was not sold or talked about as *crops,* or *ombro,* or *little ombro;* it was what we called French manufactured Dutch madder; the last I know of the sample was when it was sent by me to the plaintiffs.

His direct examination being resumed, witness said: The samples submitted to the chemists were taken from the box now in court, which contains the madder sent on from Providence; I forwarded the one hundred casks in question by the schooner, with this bill of lading of the said goods:

Landed at Bullock's wh'f

5G

170,798 lbs.

6

$102,47 88

May 8th.

Received one hundred two 48-100 dollars, for freight, as per bill of lading herewith.

L. B. TERRY.

Shipped in good order and well-conditioned, by R. H. Greene & Sons, on board the schooner called the Marietta Hand, whereof Terry is master, now lying in the port of New York, and bound for Providence, to say: One hundred casks Dutch madder, being marked and numbered as in the margin; and are to be delivered in the like good order and condition at the port of Providence, (the dangers of the seas only excepted,) unto Messrs. P. Allen & Sons, or to their assigns, he or they paying freight for the said goods, at six cents per 100 lbs., without primage and average accustomed.

In witness whereof, the master or purser of the said vessel hath affirmed to two bills of lading, all of this tenor and date; one of which being accomplished, the other to stand void

Dated New York, the 26th day of April, 1856.

J. H. HAVENS.

25 His cross-examination being resumed, witness said: I cannot state the conversation I had with defendants before the sale; I don't remember any conversation with the defendants about the madder prior to the sale.

25 William H. Taylor, being called and sworn as a witness on the part of the plaintiffs, said: I reside at Providence, in the State of Rhode Island; I was in the employ of plaintiffs in the spring of 1856.

The bill of lading, before mentioned, being exhibited to witness, he said: I recognize this paper; it was received with one hundred casks of madder, from Randall H. Greene; I don't know what day the madder was received; the freight was paid on the 8th May, as appears by endorsement on the bill of lading; the madder went up to the print works of plaintiffs; I saw the sample bottle a number of times at plaintiffs' counting-room; efforts have been made to find this bottle, but without success; my impression is that it was taken or sent to New York; I have looked for it without being able to find it; I have not seen it since the trouble about the madder began.

On being cross-examined, witness said: The plaintiffs received from the defendants a bill for this madder; I do not know where the original bill rendered is; I saw it here to-day; Mr. Low, who came on with me, was present when I saw it; I do not think that the person who showed it to me is present.

A paper being here shown to him, witness said; I cannot say whether this is a copy of the bill; I saw the original about 9½ o'clock this morning, in the small room adjoining this court-room; I saw the sample bottle last in the counting-room of the plaintiffs; I was not the one who sent it to New York, and I have no personal knowledge that it was sent; my impression that it was sent is not derived from a recollection of the fact.

Samuel Low, being called and sworn as a witness on the part of the plaintiffs, said: I was employed as a clerk in the print works
26 of the plaintiffs in the spring of 1856; the 100 casks of madder in question were received at the print works on the 8th day of May, 1856; that is the entry made at the time in the books of the concern; the print works are in Providence, and about a mile from our lower office; I know nothing about the sample bottle in question.

On being cross-examined, witness said; I have made no search for the bottle in question, and have been in the company of no one who has; there is no storage between the wharf and the print works; I think there must have been a bill rendered for this madder; I saw bills in the hands of parties this morning, when Mr. Taylor was present; Mr. Bradley, Mr. Taylor, and several other persons were present at the time.

John McCarthy, being called and sworn as a witness on the part of the plaintiffs, said: I was in the employ of the plaintiffs in the spring of '56; acted as their general manager, and superintended the using of the madder in question from beginning to end; when the first cask of the madder in question was opened, it was palpable that the cask was full of sand; it was opened about three or four weeks or so after it came to hand; we found sand in streaks in it; it was streaked through and through with sand; we experimented with it, and found that it fell short in coloring matter of the madder we had theretofore used; we discovered from two and a half to four ounces of sand to the pound; this variation in the quantity of sand would take place

in the same casks; we were obliged to shovel the sand out of the vats twice a day; at the print works we took no note of any extraneous matter in the madder but the sand; on experimenting, we found that we were using eighty pounds of this madder to twenty-four of calico, when we had before used only sixty pounds to the same quantity, to produce the same result; I saw the sample bottle in question in Mr. Greene's hands, and was told not to open it; it was very fair to look at, and I said so at the time, but I told them that I could not tell anything about it unless the bottle could be opened; I was asked about it, and I said it looked very well; it could not be judged of by any one without opening the sample bottle; it is the custom to
27 open and examine the sample bottles; there was no sand in the bottle apparent to the eye; I saw none in it; no one could have discovered the adulteration from looking at the madder in the bottle; the streaks of sand in the casks were both lengthwise and crosswise; they were strata; all madders have some sand, say one per cent. or two, but the one in question was out of all proportion, it was out of all character; it is customary to open the sample bottle in such cases; after we discovered the sand in the casks I inquired for the sample; I advised plaintiffs to send the madder back; they said that it had been paid for, and they could not do so.

On being cross-examined, witness said: The bottle now shown to me is similar to the one in question; I think the bottle that Green had was a small round bottle of clear glass.

The box containing madder to which Mr. Greene had referred in his testimony was here shown to witness, who said thereon, in answer to the plaintiffs' question: This is a sample of the madder in question, taken from the one hundred casks; on account of its having been exposed to the atmosphere, it is now darker than it was originally; the sample bottles are always examined; no wise man will buy without looking at it; this is the first I ever knew of a purchase being made where it was not examined; the madder in the bottle is always taken out, rubbed and examined; I have had an experience of 45 years in the business; on the occasion of this purchase I told them that it was impossible to tell what the quality of the madder was unless I examined it; I could only say that it looked very well

On resuming his direct examination, witness said: The madder in all the casks in question was about alike; when I spoke of seeing the sample bottle it was in Mr. Allen's possession.

James R. Chilton, being called and sworn as a witness on the
28 part of the plaintiffs, said: I am a chemist, residing in this city; I keep a book in which I enter all analyses made by me; on the 7th of June, 1856, I made an analyses of a sample of madder received by me from Mr. R. H. Greene, which yielded 38 per cent. of earthy matter.

On being cross-examined, witness said: There are different descriptions of madder; from my experiments I should say there is from five to ten per cent. of extraneous matter in madder, and this percentage belongs to the first quality; don't know what percentage is to be found in the second quality, but the proportion of ten per cent. referred to may belong to this quality.

Isaiah Deck, being called and sworn as a witness on the part of the plaintiffs, said: I am an analytical chemist, residing in this city; I made an analysis of madder for Mr. R. H. Greene, in June, 1856.

A letter dated June 11th, 1856, was here shown to witness, who said thereon: This is the letter which I wrote to Mr. Greene, and it contains a correct statement of my analysis of the madder received from him.

The said letter was here read in evidence:

18 EXCHANGE PLACE,
June 11th, '56.

Messrs. RANDALL H. GREENE & SONS:

GENT'N: The sample of madder given me for analysis contains thirty-four per cent. of impurities, of which sixteen per cent. is sand.

Yours, respectfully,

ISAIAH DECK, M. D.,
Analytical Chemist, &c.

On being cross-examined, witness said: There are several kinds of madder; the ombro is second quality; the finest is made from the interior of the root; the second class is made from the skin,
29 ground up with the interior of the roots; twelve parts in a hundred is the extent of extraneous matter in madder of the second quality; in madder of the first quality, five parts of extraneous matter is the extent.

Edward N. Kent, being called and sworn as a witness on the part of the plaintiffs, said: I am a chemist in this city; I made an analysis of madder for Mr. Greene, in June, 1856.

A letter was here shown to witness, who said thereon: This is the letter which I wrote to Mr. Greene on 9th June, 1856; the satement of analysis thereon made is correct.

The said letter was then read in evidence:

LABORATORY No. 116 JOHN STREET, near Pearl,
New York, June 9th, 1856.

Messrs. R. H. GREENE & SONS:

GENT'N: The sample of madder tested for you this day contains 36.6 per cent. earthy matters.

Yours, resp'y,

EDWARD N. KENT.

On being cross-examined, witness said: I have not in my books a more detailed statement of my analysis of the madder in question, and I am not familiar with the different descriptions of Dutch madder.

Robert A. Fisher, being called and sworn as a witness on the part of the plaintiffs, said: I reside at New Haven, Connecticut, and was for two years employed as an assistant chemist to Professor Porter; am now engaged in making analyses at the laboratory in N. H.; have been engaged as a chemist by plaintiffs at Providence; in

August,'56, I received from plaintiffs, for analysis, a sample of madder; I made two analyses of the sample; the first analysis gave 31 $\frac{77}{100}$ parts of earthy matter; and the second gave 3 $\frac{72}{100}$ parts of earthy matter; seven $\frac{21}{100}$ parts is the usual proportion of impure matter in madder.

30 John McCarthy, being recalled by counsel for plaintiffs, says: The madder sent to Fisher for analysis was from the casks in question.

On being cross-examined, witness says: I did not send it, nor did I select it, nor was I present when it was selected from the casks

Randall H. Greene, being recalled by counsel for defendants, said: The box in court (being the one before exhibited) is the one I received from the plaintiffs; I myself opened it, and sent it to the chemists.

On being cross-examined, witness said: I sent copies of the chemists' letters to the defendants; I can't say that I sent samples from the box to the defendants.

Philip Allen, sen., being called and sworn as a witness on the part of the plaintiffs, said: I am one of the plaintiffs in this case; I cannot tell where the sample bottle in question is; I have made a careful search for it in every direction; my impression is that it was returned to New York, to Mr. Greene; my son, P. Allen, jr., is now in Europe, because of his poor health.

On being cross-examined, witness said: I have no personal knowledge about the bottle in question, and no other except what I have heard from my son; I have not seen the original bill rendered for the madder; believe one was rendered, and I suppose that it is with my counsel; my impression in regard to the sample being sent to New York to Mr. Greene is derived from information from others.

Plaintiffs here rest.

Whereupon the counsel for the defence, to maintain the issues on their part, called as a witness—

Frederick Schuchardt, who, being duly sworn, said: I am one of the defendants in this cause, and one of the firm of Schuchardt
31 & Gebhard, of this city; I have been in business since 1819; until within the last seven or eight years we have carried on the shipping and importing business, and for the last eight or ten years we have added the foreign banking business; we have imported more or less Dutch madder up to 1856; since then we have not imported any; the one hundred casks in question came by ship *Mississippi*, which arrived in this port from Rotterdam on the 6th April, 1856; we had no interest in this shipment of madder; it belonged to Goll & Company, of Amsterdam; they consigned it to us for sale on their account; it was our first transaction with that house; on the 31st March we received by steamer from Liverpool a sample of madder in a glass bottle, marked "ϽG 1 to 100;" it was stopped, as I thought, with a ground glass stopper covered with a piece of bladder; we received no other specimen of the madder to my knowledge; at this time I was in New York and my partner was in the West Indies on account of his health; he left January 25th, 1856; on receipt of this bottle I sent it by Mr. Delprat, one of our clerks, to Mr. Greene, a broker in this city, to find a purchaser for the lot, which is the usual

course of business; Delprat deceased in October, 1857; he died suddenly of a disease of the heart; he was slightly cross-eyed; I directed my clerk to ask Mr. Greene to make an offer and find a purchaser; I gave no other directions, to my recollection; afterwards Mr. Greene called at my office, No. 21 Nassau street, and I think suggested that he should divide the sample in question into several bottles, and send them to various parties who might purchase; I objected, as the necessary contact with air might injure the sample and prevent a sale; the effect of air upon madder is to turn it dark; this is all which passed at that interview, to the best of my recollection; to the best of my knowledge, the next thing that occurred was that I received a sales note from Mr. Greene (being the one offered in evidence yesterday;) in the interval I had not seen or communicated with Mr. Greene; I did not know of his having gone to the eastward until yesterday; I have no recollection of having had any transactions with the plaintiffs before; my firm may have had previous transactions with the plaintiffs, but not to my knowledge; I first saw Mr. Allen to-
32 day; I never saw his son; at the time I received the sales note (April 17th) the madder in question was in this port; the vessel containing it was discharging; I had no knowledge of the sale in question except what I derived from the sales note; at the time we spoke about dividing the sample we may have determined the price, and I may have told him the lowest price we would take.

A paper being here shown to him, witness said thereon: This is a copy of the bill rendered.

On being cross-examined as to his knowledge of this paper, witness said: I know it is a copy because it is in the usual form of our bills, and is in the handwriting of the clerk who made out the original bill; this heading is the invariable heading of all our bills rendered; I saw the original bill which was made out, and I directed it to be sent.

The bill was here read in evidence:

NEW YORK, *Apr.* 25, 1856.

Messrs. PHIL. ALLEN & SONS

BO'T OF SCHUCHARDT & GEBHARD,
21 Nassau street.

No claims for deficiencies or imperfections allowed unless made within seven days from receipt of goods.

NOTE AT 6 MONTHS,

In 2 or 3 notes, payable to your own order.

One hundred casks of madder,

Wg.	170,798 10,813	4,915 Ks.	
Lbs.	159,985	*a* 11¼ c.	$17,998 31.
c.		E.	

After the receipt of the notes we made up and rendered account of sales to our principals on the 10th May, 1856; on the 26th March we had made a remittance on account, and on the 14th May we remitted

the balance up to a point ; up to this time we had heard nothing in regard to this madder ; on or about the 5th or 6th of June Mr. Greene called at our counting-house and stated that there was a large
33 earthy residuum found in using the madder, and showed me a sample of this residuum and of the madder in question found in the casks, which he said had been sent to him by plaintiffs ; this was the first notice that I had of any difficulty ; he asked me, as far as I can recollect, whether we had remitted for the goods, and I told him we had ; he then asked if we would take it back ; I replied that, being agents in the business, we could take no steps without authority from our principals ; that the madder had better be analysed ; nothing else occurred then ; I have no doubt that Greene knew we were agents ; in speaking of the price and of the madder I always represented that it was consigned ; on the 7th June I started for Europe, and was absent until the 8th November ; Mr. Gebhard returned on the 31st May, 1856 ; our firm communicated with Goll & Co. on this subject ; I know nothing more of this transaction personally; in regard to the sample bottle, the last time I saw it was when Delprat was directed to take it to Greene ; never have seen it since ; the quality of madder of the 100 casks in question answered to the denomination called in Holland *ombro ;* it is about a fourth grade madder ; I never saw the casks themselves ; I saw the sample bottle and nothing else ; the highest quality would have cost about fourteen cents per pound ; fine ombro was quoted from 16th to 19th April in that year at eleven and a half to twelve cents ; Alsace is a portion of France, bounded by the Rhine, Switzerland, and Germany on the easterly side ; French madder is produced there ; Dutch madder is produced in Zealand, a part of Holland.

Counsel for defendants hereupon offered to prove that all articles of merchandise sold by the wholesale are disposed of by exhibiting specimens as samples ; and when brokers are employed samples of all articles bought and sold are delivered to them to be exhibited. To which evidence the counsel for plaintiffs objected, and the court sustained the objection ; to which ruling an exception was taken by counsel for defendants.

On his cross examination witness says : On the 14th May we made a final remittance to Goll & Co. ; we have had some transactions
34 with them since, but none of any account, nor involving money; we have discontinued dealing in madder since 1856, on account of this occurrence with the plaintiffs ; we received subsequent consignments from same house ; they came when I was in Europe.

His direct examination being resumed, witness says : I meant when I said that we had no subsequent moneyed transaction with Goll & Co. that we owed them no money; we have made advances to them.

Counsel for defendants thereupon offered in evidence the following depositions, taken under a commission heretofore issued in this cause, which were received and read, subject to all legal objections :

Charles Albert Van Renterghem, of Goes, in the province Zealand, of the kingdom of the Netherlands, manufacturer, aged fifty-one years and upwards, being duly and publicly sworn, pusuant to the directions

annexed to the said commission, and examined on the part of the defendants, doth depose and say as follows, viz:

First. To the first interrogatory he saith: My name is Charles Albert Van Renterghem; my age is fifty-one years and upwards; my residence, Goes, in the province Zealand, of the kingdom of the Netherlands; my occupation is madder and garancine works; I have no partnership. The name of my firm is Dr. C. A. Van Renterghem & Comp. I have conducted for my own account the business of this my firm, and do so still. I do not know, and have never known, either of the parties to this action.

Second. To the second interrogatory he saith: I know nothing about the shipment and consignment of the hundred casks of madder to the defendants.

Third. To the third interrogatory he saith: I have manufactured at the end of the year 1855, and the beginning of the year 1856, one hundred casks of madder, marked S F No. 133 to 142; 143 to 152; 193 to 202; 203 to 212; 213 to 222; 223 to 232; 233 to 242; 243 to 252; 253 to 262; 263 to 272; they were manufactured by me at my factory, and they were fully and fairly merchantable for the quality, and in perfect good condition.

Fourth. To the fourth interrogatory he saith: Samples were taken from the above-mentioned casks fairly and in the usual and customary manner, and the bulk did correspond with the samples so taken.

Fifth. To the fifth interrogatory he saith: A sample was delivered by me to Messieurs W. & C. Voute; I delivered it personally, being at Amsterdam, and the parcel was sold and purchased thereby.

Sixth. To the sixth interrogatory he saith: This does not regard me.

Seventh. To the seventh interrogatory he saith: I know nothing about the shipment.

Eighth. To the eighth inerrogatory he saith: It is common for all madder to have more or less earthy matter in it. An inferior quality of madder contains more earthy matter than a superior quality. All Merchants who buy madder know this very well; they likewise know that the quality SF is our lowest mark, and the price is accordingly the lowest.

Last. To the last interrogatory he saith: I do not know the firm of Schuchardt & Gebhard, nor anything concerning their transactions in general, or this transaction in particular. I have only to add that the above-mentioned hundred casks manufactured by me, and marked with my said mark, SF, and the numbers above mentioned, were in every respect merchantable, and equal to the same article as known in the commerce by that mark.

The same witness, sworn as above, then *cross-examined*, on the part of the plaintiffs, doth depose and say as follows, viz:

First. To the first cross-interrogatory he saith: It is quite impossible for me to indicate the names of the different parties from whom I purchased or received the material for such manufacture in that season, as it is sold to me, and purchased by me, on every market day in numerous small lots, from the cultivators. The average price, in the years 1855 and 1856, of roots, was, per fifty Nether-

land pounds, nineteen and a half florins or guilders, Dutch currency, and of mulls from six to eight florins or guilders. My personal participation in the manufacture is that of general inspection and overview, and regular control of all and every operation in the manufacture. The processes of madder manufacturing differ according to quality; my quality, SF, is only dried, pulverified by grinding, and prepared to be put up in casks when it is fully ready for delivery. Such was the course of processes to which the above-mentioned hundred casks of madder sold by me to Messieurs W. & C. Voute, were reglarly subjected from the beginning to the end, under my personal inspection and control, and there cannot be any question of mingling with othes parties of madder manufactured, or partially or wholly manufactured, as each quality of madder is strictly kept separate from any other quality.

Second. To the second cross interrogatory he saith: I never manufactured or sold adulterated madder, and no adulterated madder ever left my establishment. The quality SF is only manufactured and sold by me when the quality is required by purchasers, who then pay the inferior price according to the inferior quality; the mark itself indicates the quality, and fixes the value.

Third. To the third cross-interrogatory he saith: All the parcels of madder sold to any parties are always put up in casks under my immediate and personal control.

Fourth. To the fourth cross-interrogatory he saith: Having deposed that I knew nothing about the shipment and consignment of the hundred casks of madder SF, sold by me to Messrs. W. & C. Voute, I have nothing to reply to this cross-interrogatory.

37 *Fifth.* To the fifth cross-interrogatory he saith: I am invariably accustomed to take, myself, samples of every parcel of madder ready for sale and delivery, and so I did with the sample of the above-mentioned parcel of madder. The samples of inferior qualities of madder are never subjected to any chemical analysis, which is altogether unnecessary, as every intelligent merchant knows them at first sight.

Sixth. To the sixth cross-interrogatory he saith: I have already deposed all I know with regard to this cross-interrogatory, having taken and delivered, myself, the samples of the madder, by whom they were approved and purchased; and the said hundred casks of madder, in every respect corresponding with those same samples, were delivered under my immediate and personal control.

Seventh. To the seventh cross-interrogatory he saith: It is common for all madder to have more or less earthy matter in it. The usual or average percentage of such earthy matter is wholly dependent of the price which the purchasers choose pay; the lowest quality indicated by the mark has the most earthy matter in it. All merchants, and all who employ madder, are aware thereof; they all know that the best and dearest qualities are more fit for use than the cheaper and inferior qualities.

Eihgth. To the eighth cross-interrogatory he saith: Never having manufactured, sold, or purchased adulterated madder, I am totally unacquainted with the mode of adulteration which may be practiced.

Ninth. To the ninth cross-interrogatory he saith: In answer to the fifth and sixth direct interrogatories, I have deposed all I knew about the sample. The legal qualification of Messrs. C. & W. Voute, as appointed by public authority, and sworn brokers, and their high reputation of probity in the extensive commercial transactions concluded by them, however, excludes, in my mind, the possibility of a
38 doubt that the parties to whom they may have sold the lot must have received the identical samples; no one in Holland can entertain a doubt on this subject.

Tenth. To the tenth cross-interrogatory he saith: I know nothing about the shipment.

Eleventh. To the eleventh cross-interrogatory he saith: I have no letter or copies of letters which concern this affair.

Twelfth. To the twelfth cross-interrogatory he saith: There are different qualities of madder known in the markets of Holland, and elsewhere, by their mark, as, Old Manufacturing; Fine crop, marked $K\frac{2}{1}$ or $\frac{1}{1}$; Umbro, marked O; Gamane, marked $A\frac{2}{1}$ or $\frac{1}{1}$; Overstamped, marked OVS; Mulls, marked M; New manufacturing, E×F, SFFF, SFF, and most inferior SF; I only manufacture, under my personal guarantee, the quality E×F, SFFF, and SFF, by marking each cask with the marks corresponding to their quality; the quality E×F is the hearth or wooden internal part of the madder root, the most valuable and pure quality; nearest in quality is SFFF, equally pure, but manufactured of the whole root, whereas the quality SFF is only partly purified; as to SF, I have repeatedly stated that it is the most inferior quality known, sold and purchased by all as such.

Last. To the last cross-interrogatory he saith: I have nothing more to add.

C. A. VAN RENTERGHEM.

William Voute, of Amsterdam, in the province of North Holland, of the kingdom of the Netherlands, broker, aged forty-five years and upwards, being duly and publicly sworn, pursuant to the directions annexed to the said commission, and examined on the part of the defendants, doth depose and say as follows, viz:

First. To the first interrogatory he saith: My name is William Voute; my age is forty-five years and upwards; my residence
39 Amsterdam; I am broker, appointed by public authority, and sworn as such. My firm has ever since the year 1841 been and is W. & C. Voute, of which Mr. Cæsar Voute is copartner; neither he nor I are partners of any other firm or partnership. I have for many years known both the manufacturers and purchasers, in Holland, of the hundred casks of madder in question, but have no interest whatever in their business or concerns; but I do not know the parties to this action, or either of them.

Second. To the second interrogatory he saith: I know that the hundred casks of madder were shipped in the earlier part of the year 1856, by the ship Mississippi, Capt. Allen, from Rotterdam. The care of the shipment was entrusted to the firm of Meinhard Retemeyer & Co., of Rotterdam, and the marks and numbers by which they were

known and indentified in such shipment were OG, from No. 1 to No. 100.

Third. To the third interrogatory he saith: This party of one hundred casks of madder was manufactured by Mr. Charles Albert Van Renterghem, whose firm is Dr. A. A. Van Renterghem & Co., at the manufactory, in Goes, in the latter part of 1855 and the beginning of 1856.

Fourth. To the fourth interrogatory he saith: Samples were taken by the manufacturer at his establishment; he delivered a sample to me personally, at Amsterdam, and it was by that sample that the purchase was concluded by my intervention as broker, and there is not the least doubt that the samples had been taken fairly and in the usual manner, for after the sale and purchase had taken place, and the goods arrived at Rotterdam for shipment, samples were again drawn by Meinhard Retemeyer & Co., of that city, according to my orders, and in the customary way, and were sent to my office, and I carefully examined those new samples and formed of them the average samples, and I compared them with the original sample whereby the transaction had taken place, and found the new samples in every respect corresponding with the original samples. The usual manner of drawing the samples is by employing a long steel machine, made for the purpose, in order to get the samples from the very centre of the casks, so that the bulk must necessarily correspond with the samples so taken.

Fifth. To the fifth interrogatory he saith: I have already answered to this interrogatory in my answer to the fourth interrogatory; I have only to add that, having found the new samples fully to agree with the original sample whereby the purchase had been concluded for Messrs. Goll & Co., I sent average samples to said purchasers, which were forwarded per steamer from Liverpool to America.

Sixth. To the sixth interrogatory he saith: I concluded the purchase in my capacity of broker for Messrs. Goll & Co., as purchasers, from the manufacturers, Dr. C. A. Renterghem & Co., as sellers; and have already stated that it is fully established that the samples were fair, and that the fresh samples, drawn after delivery, corresponded perfectly with the original sample, and that therefore the bulk could not but correspond with the samples, both the original and those taken after delivery.

Seventh. To the seventh interrogatory he saith: I have already answered all this in my answers to the preceding interrogatories, and could only repeat what I have deposed already. No samples were sent by the Mississippi, but by the steamer from Liverpool to New York; the original marks and numbers were SF, No. 193 to 272; 133 to 152; all with the year 1855. The shipping marks and numbers were OG, No. 1 to No. 100.

Eighth. To the eighth interrogatory he saith: Certainly all madders, both Dutch and foreign, contain earthy matter, according to their superior or inferior quality. Purchasers do not like to pay a proportionate price for madders whereof the roots are wholly exempt from all earth substance. The above-mentioned hundred casks of mad-

der were equal to other parcels of the quality SF, and several hundreds of casks were sold of the same quality, which gave satisfaction.

41 *Last.* To the last interrogatory he saith: It is evident I cannot say what the third or fourth buyer expected when purchasing these hundred casks of madder, but I can positively affirm that they were of the identical quality for which sold, and fairly and fully corresponded with the sample by which they were purchased.

The same witness, sworn as above, then cross-examined on the part of the plaintiffs, doth depose and say as follows, viz:

First. To the first cross-interrogatory he saith: This does not regard me, I being broker, and not manufacturer.

Second. To the second cross-interrogatory he saith: This does not regard me, for the reason already alleged.

Third. To the third cross-interrogatory he saith: For the same reason this cross-interrogatory is strange to me.

Fourth. To the fourth cross-interrogatory he saith: I neither manufactured nor shipped the hundred casks of madder.

Fifth. To the fifth cross-interrogatory he saith: I have already stated the way in which the samples were taken, and whatever concerns the sampling, and could only repeat here what I have deposed in my answers to the fourth and fifth direct interrogatories. No chemical process took place either by me, or by any one else, so far as I know, this being unusual and altogether unnecessary where goods are sold by sample, and are found, by the drawing of fresh samples, to be of the same quality. Mr. Alexander Mendel was present when I formed the average samples, after having received the fresh samples from Rotterdam, and he expressed the same conviction of the fresh samples drawn at Rotterdam, fully corresponding with the original sample.

Sixth. To the sixth cross-interrogatory he saith: As far as

42 concerns this transaction, concluded by my intervention, as broker between the manufacturer, Mr. Charles Albert Von Renterghem, and the purchasers, Messrs. Goll & Co., I have already fully answered the questions contained in this cross-interrogatory. If the tendency of this question is to learn from me what other parcels of madder were sold and purchased between other sellers and purchasers, and the price and terms of such sale or sales, my oath of secrecy, as broker, would not allow me to divulge what concerns other parties, and is wholly strange to this transaction and to these parties. What regards specially this transaction, it must suffice that I have already said all I know. There are no letters or copies of letters in my possession or under my control relating to this transaction.

Seventh. To the seventh cross-interrogatory he saith: I have already answered to this question in my answer to the eighth direct interrogatory. There is no absolute rule whatever fixing a maximum of earthy matter; the greater the purity of the merchandise is, the greater the value, and the higher the price is. Inferior prices correspond with inferior qualities. No law or custom binds any one to remain below a given percentage of earthy matter. It is, therefore, not possible to determine what is usual as average amount or percentage of earthy matter. In every special transaction, the parcel of madder

is examined, and the price is fixed between seller and purchaser, according to the quality, in which case the purchaser can evidently have no claim except to receive the parcel he thus examined and purchased; or the parcel of madder, after examination of the sample, is sold and purchased by the sample, in which case the purchaser can only be entitled to have the parcel of madder from which such sample was fairly taken or drawn, and then the bulk of the madder must necessarily correspond with such sample. I know of no other mode of transacting the commerce of madder as customary, and have never heard of such commerce by fixing an average percentage of earthy substance or matter.

Eighth. To the eighth cross-interrogatory he saith: Some
43 cultivators do not purify the roots at all, or not sufficiently; this practice is highly prejudicial, but can be detected and ascertained by inspection by the eye alone. An experienced eye cannot fail to discover it when examining the sample, by the working of the madder when exposed to the atmosphere. Since the last eight months, or later, a new and fraudulent mode has been practiced of adulterating madders by working them over, employing a small quantity of the finest madder crop and a good quantity of sand of the finest description. Measures have been taken to prevent this practice as far as possible, and it being more difficult to detect this fraud by the inspection by the eye alone, there may then be occasion for some or other chemical process when doubts arise.

Ninth. To the ninth cross-interrogatory he saith: By personal examination and comparing of the original sample, by which the hundred casks of madder were purchased, with the samples drawn by Meinhard Retemeyer & Co., I have the full and positive conviction that the bulk did fairly correspond with the original sample, and was merchantable and in good condition. I have already answered to the other questions of this cross-interrogatory.

Tenth. To the tenth cross-interrogatory he saith: I have answered already to all the points contained in this cross-interrogatory.

Eleventh. To the eleventh cross-interrogatory he saith: I have likewise already said, that there are no letters or copies of letters, relating to this transaction, in my possession or under my control.

Twelfth. To the twelfth cross-interrogatory he saith: The qualities of Dutch madder differ widely, and the different denominations may be best specified as follows: Stamped madders, and ground (grinded) madders, the former distinguished in the following, as *fine*, *crop*, *little crop*, *umbro*, *little umbro*, *gamene*, *overstamped* mulls; and the latter distinguished by the following marks, as EXSFF, SFFFF,
SFFF, SFF, SF, OF and F. These denominations can be called
44 different specifications, but they cannot be considered as so many classes legally determined, and as such binding the manufacturer, as there is no law nor custom which defines precisely the quality of each denomination. Madders are in Holland sold and purchased according to the quality, previously examined, although the different denominations indicate the different quality, which the manufacturer attaches to his madders. Thus the hundred casks in question were classified by the manufacturer SF, but the purchase

took place by sample, after it had been duly examined, and at the reception of the goods the samples were again drawn and carefully examined, and it thus appeared that the article was fairly and fully what the purchaser was entitled to.

Last. To the last cross-interrogatory he saith: Nothing, except my conviction that the transaction was in every respect fair and honorable.

W. VOUTE.

Alexander Mendel, of Amsterdam, in the province of North Holland, of the kingdom of the Netherlands, manufacturer of garancine, aged thirty-seven years and upwards, being duly and publicly sworn, pursuant to the directions annexed to the said commission, and examined on the part of the defendants, doth depose and say as follows, viz:

First. To the first interrogatory he saith: My name is Alexander Mendel; my age is thirty-seven years and upwards; my residence Amsterdam; my occupation manufacturer of garancine. My firm has, since the year 1851, been Mendel, Bour & Co., of which Mr. Eugene Bour was and is copartner. Neither he or I are partners of any other partnership. I do not know the parties to this action, nor either of those parties.

Second. To the second interrogatory he saith: I know the whole transaction, having wholly conducted it myself for Messrs. Goll & Co. The hundred casks of madder, marked OG, No. 1 to No. 100, were shipped by Meinhard Retemeyer & Co., for account and by order of Messrs. Goll & Co., in the beginning of 1856, per *Mississippi*, Captain Allan.

Third. To the third interrogatory he saith: This parcel of madder has been manufactured and put in casks, as far as I know, towards the end of 1855, and in the beginning of 1856, by Messrs. Dr. C. A. Van Renterghem & Co., of Goes.

Fourth. To the fourth interrogatory he saith: I had nothing to do with the taking or drawing of samples.

Fifth. To the fifth interrogatory he saith: The sample delivered by Mr. Charles Albert Van Renterghem to the brokers W. & C. Voute, was by said brokers presented to Messrs. Goll & Co., which did lead to the purchase of this parcel of madder, concluded by me for account of Messrs. Goll & Co. Then, when the goods arrived at Rotterdam for shipment, fresh samples were drawn by Meinhard Retemeyer & Co., and sent to the brokers W. & C Voute, who examined them in my presence, and compared them with the original sample, and came to the conclusion, as I did myself, that the madders delivered by the manufacturers fully and fairly corresponded with the madder sold by the manufacturer, and purchased by me in name and for account of Messrs. Goll & Co. The average samples were by brokers forwarded to the office of Messrs. Goll & Co., and thence per steamer from Liverpool to New York sent to Messrs. Schuchardt & Gebhard. No samples were sent by the *Mississippi*, but when the madder was shipped in Rotterdam, the samples were sent *via* Liverpool.

Sixth. To the sixth interrogatory he saith: The brokers, W. & C. Voute, bought the parcel of madder in question by the before-mentioned original sample. I authorized them in the name and for account of Messrs. Goll & Comp., to make this purchase and thus to accept the offers of Messrs. Dr. C. A. Van Renterghem &
46 Comp. as sellers. Before giving this authorization, I had examined the original sample and I again examined the fresh samples drawn by Messrs. Meinhard Retemeyer, of Rotterdam, and found that the original sample was a fair sample, and that there was no objection whatever to the quality or condition of the hundred casks of madder.

Seventh. To the seventh interrogatory he saith: The shipping mark and numbers were ƆG, No. 1 to No. 100, as already mentioned in my answer to the second interrogatory. The original marks and numbers were SF, No. 190 to No 272, and No. 133 to No. 152. The average sample was sent by the steamer *via* Liverpool; it was a fair sample, to which the bulk must necessarily correspond, and no change or adulteration was possible; and I saw it once more at the office of Messrs. Goll & Co. before it was forwarded to Messrs. Schuchardt & Gebhard.

Eighth. To the eighth interrogatory he saith: It is common and known that all madder, whatever may be the quality, contains earthy matter to a larger or smaller extent. Madder, being ground out of madder root, is never wholly exempt of earthy matter, and the difference of quality just consists in the more or less cleaned state of the parcel of madder root; it is this which determines the value. The hundred casks of madder in question were not inferior to the usual quality of this kind of madder, of which and similar sorts, several hundreds of casks have been exported these last years, as also several hundred casks which even were inferior, as containing a larger portion of earthy matter. No foreign substances were in this madder; it contained nothing not originating from madder roots.

Last. To the last interrogatory he saith: I have nothing to add, it being manifest from what I have already said that the whole transaction was regular. The samples and the bulk fully and fairly corresponding, there can be no reason for complaint.

47 The same witness, sworn as above, then cross-examined on the part of the plaintiffs, doth depose and say as follows, viz:

First. To the first cross-interrogatory he saith: This does not regard me, but the manufacturers.

Second. To the second cross-interrogatory he saith: This only concerns the manufacturer.

Third. To the third cross-interrogatory he saith: This does also not concern me.

Fourth. To the fourth cross-interrogatory he saith: The shipment having been effected by Messrs. Meinhard Retemeyer & Co., by order of Messrs. Goll & Co., this question regards them. They were ordered by Messrs. Goll & Co. to put the shipping mark ƆG No. 1 to No. 100, upon the casks.

Fifth. To the fifth cross-interrogatory he saith: I did not draw the samples, and in this respect refer to the answers I have already given; but I saw them at the office of the brokers, where I examined them,

as I am accustomed, by putting a part upon a black board, in order to judge the quality; no chemical analysis was made, nor was the proportion of earthy matter reduced to percentage, which is not customary in the madder trade.

Sixth. To the sixth cross-interrogatory he saith: I saw the sample at the office of Mr. Voute, and afterwards at the office of Messrs. Goll & Co. The transaction was concluded in the customary manner, that is to say: I bought for account of Messrs. Goll & Co., by a sample shown to me by the broker, one hundred casks of madder, to be delivered by Messrs. Dr. C. A. Van Renterghem & Co., and the price was the regular market price for such quality, which I do not deem myself authorized to mention, as the later purchasers cannot be entitled to pry into the price, at which their sellers or the preceding sellers bought themselves. I repeat once more that it was the regular market price for the quality. No other terms were stipulated
48 than payment in cash upon delivery. The average sample was sent by me for account of Messrs. Goll & Co. to Liverpool, in order to be forwarded from thence to Messrs. Schuchardt & Gebhard per steamer. I already stated that no chemical analysis was made, and the whole transaction was conducted by me personally and verbally.

Seventh. To the seventh cross-interrogatory he saith: It it not at all customary in the madder trade to reduce to percentage the proportion of earthy matter contained in madder which differs in every parcel. I have an extensive experience, having, as garancine manufacturer, observed constantly the considerable variations of the madders in this respect. I have manufactured more than ten thousand casks, but have never either myself reduced the proportion of earthy matter to a percentage, in order to obtain a precise estimation thereof, nor heard or seen this practiced by others. Earthy matter diminishes the dye stuff, and consequently influences on the value, without, however, making the madder unfit for use. Parcels of madder, of which more than the half consisted of earthy matter, were and are, nevertheless, used for the purpose of dyeing. I am sure that no foreign substances were added, and no adulteration whatever was practiced with regard to the hundred casks of madder in question. I should have observed this when the fresh samples were compared by me with the original sample by which the purchase was made.

Eighth. To the eighth cross-interrogatory he saith: Madder was formerly never adulterated in Holland, and even now fraudulent practices are very rare; however, since the last crop, some persons have begun to mix and grind fine sand together with roots, which an experienceed buyer can easily detect. I know of no other mode of adulteration which would not be ascertainable by the eye. I have heard that there are other modes of adulteration practiced in France, but I am convinced that they can be detected, although, perhaps, chemical processes may be necessary.

49 *Ninth.* To the ninth cross-interrogatory he saith: As I have already stated, I have personally seen all the samples, and it is beyond all doubt that the samples were fairly drawn. Both the manufacturer and the brokers have my full confidence, I having bought in the same manner more than ten thousand casks by the intervention

of the same Messrs. W & C. Voute, without ever having had any cause of complaint.

Tenth. To the tenth cross-interrogatory he saith: I know that the shipment of the hundred casks was made to Messrs. Schuchardt & Gebhard, because I conducted the whole transaction for Messrs. Goll & Company. At that period no other parcel of madder was shipped from Rotterdam to Messrs. Schuchardt & Gebhard. The weight, also, is a proof of identity of the casks manufactured, sold, and delivered by Dr. C. A. Van Renterghem & Company, of Goes. With regard to the samples, I have said all that can be said.

Eleventh. To the eleventh cross-interrogatory he saith: I possess no letters, nor copies of letters, which concern or explain my deposition.

Twelfth. To the twelfth cross-interrogatory he saith: I am unable to give information concerning foreign markets. Here, in Holland, there is a variety of qualities, the number of which cannot be exactly determined. They vary in growth, color, purity, and weight, and in many other respects which cannot be precisely described. There are ground and stamped madders, and the value varies from four florins or guilders to forty florins or guilders per fifty Netherland pounds. All sorts are destined, and more or less fit, for dyeing, printing, and for making garancine. The commerce does not attach any decisive importance at all to the denomination, or to the mark which signifies the denomination. I can, however, declare positively, that I have known the denomination and mark SF of other manufacturers to be almost a third less in purity and value than the hundred casks in question.

50 *Last.* To the last cross-interrogatory he saith: I have nothing to add in favor of the plaintiffs, as all I know of the transaction, according to my conviction, proves against them.

A. MENDEL.

Meinhard Retemeyer, of Rotterdam, in the province of South Holland, of the kingdom of the Netherlands, aged fifty-three years and upwards, being duly and publicly sworn, pursuant to the directions annexed to the said commission, and examined on the part of the defendants, doth depose and say as follows, viz:

First. To the first interrogatory he saith: My name is Meinhard Retemeyer; my age, fifty-three years and upwards; my residence, Rotterdam; my occupation, commissioner, principally for expedition business. My firm has, since about twenty-five years, been Meinhard Retemeyer & Co., and since about six years have no copartner. I am not copartner of any other firm. I do not know either of the parties to this action.

Second. To the second interrogatory he saith: I know of the shipment and consignment of hundred casks of madder to Schuchardt & Gebhard, of the city of New York, in the beginning of 1856, per the ship *Mississippi*, Captain Allen, and marked and numbered ○G No. 1 to 100, as this was effected by me by order of Messrs. Goll & Co., and I acted as commissioner for the expedition, and caused said marks

and numbers to be put upon the casks, whereby they were known and identified in the shipment.

Third. To the third interrogatory he saith: I have nothing whatever to say concerning the manufacture, as this regards the manufacturer.

Fourth. To the fourth interrogatory he saith: Having received the hundred casks, I was ordered by Messrs. W. & C. Voute to draw the samples in the usual way, that is, by a steel machine destined for that purpose, in order to penetrate to the centre of the casks, and
51 to be sure that the bulk corresponds with the samples thus drawn. This order I executed fairly

Fifth. To the fifth interrogatory he saith: I sent the samples thus drawn to Messrs. W. & C. Voute. With regard to the sale and purchase, I knew nothing whatever.

Sixth. To the sixth interrogatory he saith: This does not regard me. I know nothing concerning this interrogatory.

Seventh. To the seventh interrogatory he saith: No sample was sent with the hundred casks to Messrs. Schuchardt & Gebhard, but it is very possible, although I cannot say it positively, that among the objects sent by me *via* Liverpool, there may have been such sample or samples. All the rest, as far as I know, I have already answered.

Eighth. To the eighth interrogatory he saith: I am wholly unacquainted with the madder commerce.

Last. To the last interrogatory he saith: I know nothing more concerning the transaction, but I repeat that the samples drawn by me from the hundred casks were fair and faithful samples.

The same witness, sworn as above, then cross-examined on the part of the plaintiffs, doth depose and say as follows, viz:

First. To the first cross-interrogatory he saith: I know nothing about it.

Second. To the second cross-interrogatory he saith: I know nothing about it.

Third. To the third cross-interrogatory he saith: I know nothing about it.

52 *Fourth.* To the fourth cross-interrogatory he saith: I have no letters or copies of letters which spread any light upon this transaction.

Fifth. To the fifth cross-interrogatory he saith: I refer to my answers to the direct interrogatories, being the fourth and fifth.

Sixth. To the sixth cross-interrogatory he saith: I refer to my answers already given.

Seventh. To the seventh cross-interrogatory witness saith: I know nothing about it.

Eighth. To the eighth cross-interrogatory he saith: I am wholly ignorant of the madder commerce.

Ninth. To the ninth cross-interrogatory he saith: I know nothing of the sale and purchase, and as for the samples drawn at Rotterdam, I refer to my former answers.

Tenth. To the tenth cross-interrogatory he saith: I refer to my former answers given to the fourth and fifth direct interrogatories.

Eleventh. To the eleventh cross-interrogatory he saith: I have already answered this question.

Twelfth. To the twelfth cross-interrogatory he saith: I repeat that I am ignorant of the madder commerce.

Last. To the last cross-interrogatory he saith: I have nothing to add.

M. RETEMEYER.

Henry Luden, of Amsterdam, in the province of North Holland, in the kingdom of the Netherlands, merchant, aged thirty-five years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the defendants, doth depose and say as follows this, viz:

53 *First.* To the first interrogatory he saith: My name is Henry Luden; my age, thirty five years and upwards; my residence, Amsterdam; my occupation, merchant. I do not know either of the parties to this action. I am the only chief of my firm, Goll & Co., and am not member of any other firm.

Second. To the second interrogatory he saith: I know of the shipment and consignment of one hundred casks of madder to Messrs. Schuchardt & Gebhard, but no part of this transaction was conducted by me, but all exclusively by Mr. Alexander Mendel for the account of my firm.

Third. To the third interrogatory he saith: I have nothing to answer.

Fourth. To the fourth interrogatory he saith: I have nothing to answer.

Fifth. To the fifth interrogatory he saith: I know nothing of it personally.

Sixth. To the sixth interrogatory he saith: I repeat my former answer.

Seventh. To the seventh interrogatory he saith: Messrs. Meinhard Retemeyer & Company, of Rotterdam, were the expeditioners, but I repeat that I took no personal share in the execution.

Eighth. To the eighth interrogatory he saith: I have only a superficial knowledge of the madder commerce, and cannot answer this interrogatory.

Last. To the last interrogatory he saith: I have nothing to add.

The same witness, sworn as above, then cross-examined on the part of the plaintiffs, doth depose and say as follows, viz: X.

54 The testimony being closed, the counsel for the defendants thereupon prayed the court to instruct the jury as follows:

1. That the gist of the plaintiffs' action is an alleged false warranty and deceit on the part of the defendants in the sale of the madder in question; and to entitle them to recover against the defendants in this action, they must establish to the satisfaction of the jury such alleged false warranty and deceit.

2. That in this form of action the plaintiffs cannot recover, without evidence to establish a *scientu* on the part of the defendants.

X.

1st. To the first cross-interrogatory, he saith: I know nothing about it.
2d. To the second cross-interrogatory, he saith: I know nothing about it.
3d. To the third cross-interrogatory, he saith: I know nothing about it.
4th. To the fourth cross interrogatory, he saith: I have no documents which spread any light upon this transaction.
5th. To the fifth cross-interrogatory, he saith: I refer to the answers already given.
6th. To the sixth cross-interrogatory, he saith: I repeat what I have said.
7th. To the seventh cross-interrogatory, he saith: I have already answered that; I took no personal active share in the madder commerce.
8th. To the eighth cross-interrogatory, he saith: I repeat what I have said.
9th. To the ninth cross-interrogatory, he saith: I have nothing to answer.
10th. To the tenth cross-interrogatory, he saith: I refer to my answer to the fourth cross-interrogatory.
11th. To the eleventh cross-interrogatory, he saith: I have repeatedly said that I am not versed in the madder commerce.
Last. To the last cross-interrogatory, he saith: I have nothing to add.

H. Luden.

3. That the broker had no authority or power to warrant that the bulk should correspond with the madder contained in the bottle and thus bind the defendants. But even if he had such power, still he did not so warrant the same.

55 4. That this was not such a sale by sample as in law amounts to a warranty that the bulk shall correspond with the sample.

5. That if there was any warranty it was only at most an implied one, under which the defendants are not liable for any adulteration of the bulk of the madder, unless the plaintiffs have established, by competent evidence, fraud in respect thereto, on the part of the defendants.

6. If there was a warranty of any kind, still the terms stated in the bill rendered limited the defendants' liability thereon to seven days; and if no demand for damages was made by the plaintiffs within that time, then they are not entitled to recover in this action.

The court refused to give either of the several instructions to the jury above prayed for, and the counsel for the defendants there-

56 upon excepted to each of said rulings.

And inasmuch as the said several matters so produced, and given in evidence on the part of the plaintiffs and defendants, respectively, and the said requests to charge, and refusals thereto, do not appear by the record of the verdict aforesaid, the said counsel for the defendants did propose these their exceptions in writing to the said refusals to charge, and requested the said justice to put his seal to this bill of exceptions, containing the said several matters, so produced and given in evidence, and the said charge and exceptions as aforesaid, according to the form of the statute in such case made and provided.

And thereupon the said justice of the said court, at the request of the said counsel for the defendants, did then and there, at the said trial, put his seal to this bill of exceptions, pursuant to the said statute and the rules and practice of the said court, on the afore-

57 said 25 of May in the year one thousand eight hundred and sixty-one.

S. NELSON. [L. S.]

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the condition of the judgment of a plea which is in the said circuit court before you, or some of you, between Philip Allen, Philip Allen, junior, and Charles B. Allen, plaintiffs, and Frederick Schuchardt and Frederick C. Gebhard, defendants, in a plea of trespass on the case, a manifest error hath happened, to the great damage of the said Frederick Schuchardt and Frederick C. Gebhard, as is said and as appears by their said complaint, we being willing that such error, if any hath been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly,

59 you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this 25th day of March, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

KENNETH G. WHITE, *Clerk*,

60 *Clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit.*

Endorsed: Supreme Court.—Frederick Schuchardt *et al.*, *ads.* Philip Allen *et al.*,—writ of error.

Filed March 25, 1862.

61 In the United States Supreme Court.

PHILIP ALLEN, PHILIP ALLEN, Jr., and CHARLES B. ALLEN,
vs.
FREDERICK SCHUCHARDT and FREDERICK C. GEBHARD.

Know all men by these presents, that we, Frederick Schuchardt, Frederick C. Gebhard, and William H. Gebhard, and Robert R. Stuyvesant, of the city and State of New York, are held and firmly bound unto Philip Allen, Philip Allen, junior, and Charles B. Allen, of Providence, in the State of Rhode Island, in the sum of fifteen thousand dollars, lawful money of the United States of America, to be paid to the said Philip Allen, Philip Allen, jr., and Charles B. Allen, their and each of their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and sev-

62 erally, firmly by these presents.

Sealed with our seals, dated this 24th day of March, one thousand eight hundred and sixty two.

Whereas the above-named Frederick Schuchardt and Frederick C. Gebhard have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by the circuit court of the United States for the second circuit and southern district of New York, in a certain action wherein the above-named Philip Allen, Philip Allen, jr., and Charles B. Allen, were plaintiffs, and Frederick Schuchardt and Frederick C. Gebhard were defendants, in favor of the said plaintiffs and against the said defendants:

Now, therefore, the condition of this obligation is such, that if the above-named Frederick Schuchardt and Frederick C. Gebhard shall

prosecute their writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obli-
63 gation shall be void; otherwise, the same shall be and remain in full force and virtue.

FREDERICK SCHUCHARDT. [L. S.]
FRED'K C. GEBHARD. [L. S.]
WM. H. GEBHARD. [L. S.]
ROB'T STUYVESANT. [L. S.]

Sealed and delivered in presence of—
CHAS. W. NEWTON, *U. S. Com'r.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William H. Gebhard, being duly sworn, deposes and says that he is one of the subscribers to the foregoing bond, and that he is a resident and freeholder within the southern district of New York, and is worth the sum of fifteen thousand dollars over all his debts and liabilities, exclusive of property exempt by law from execution.

WM. H. GEBHARD.

Sworn to before me M'ch 24, 1862.

CHAS. W. NEWTON,
U. S. Commissioner for the South'n Dist. of New York.

54 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Robert R. Stuyvesant being duly sworn, deposes and says that he is one of the subscribers to the foregoing bond, and that he is a resident and freeholder within the southern district of New York, and that he is worth the sum of fifteen thousand dollars over all his debts and liabilities, exclusive of property exempt by law from execution.

ROB'T R. STUYVESANT.

Sworn to before me, March 24, 1862.

CHAS. W. NEWTON,
U. S. Commissioner for the Southern Dist. of N. Y.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this 24 day of March, 1862, before me personally came Frederick Schuchardt, Frederick C. Gebhard, William H. Gebhard,
65 and Robert R. Stuyvesant, known to me to be the same persons described in and who executed the foregoing bond, and acknowledged to me that they executed the same for the uses and purposes therein mentioned.

CHAS. W. NEWTON,
[L. S.] *U. S. Commissioner for the Southern Dist. of N. Y.*

Endorsed: Supreme Court. Philip Allen and *als. ag'st* Frederick Schuchadt and *al.* Bond on writ of error. The within bond approved.

WM. D. SHIPMAN, *Judge.*

MAR. 20, 1862.

Filed M'ch 25, 1862.

By the honorable William D. Shipman, one of the judges
66 of the circuit court of the United States for the southern district of New York, in the second circuit:

To Philip Allen, Philip Allen, jr., and Charles B. Allen:

Whereas Frederick Schuchardt and Frederick C. Gebhard have lately issued out of the Supreme Court of the United States of America a writ of error, directed to the judges of the circuit court of the United States for the southern district of New York, in the second circuit, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judges thereof, between you, the said Philip Allen, Philip Allen, jr., and Charles B. Allen, plaintiffs, and Frederick Schuchardt and Frederick C. Gebhard, defendants, a manifest error hath happened to the great damage of the said Frederick Schuchardt and Frederick C. Gebhard:

67 And whereas, for the correction of that error, in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, to be held at the Capitol, in the city of Washington, on the first Monday of December, 1862: You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 25th day of March, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

WM. D. SHIPMAN, *Judge.*

Endorsed: Supreme Court. Frederick Schuchardt and *als. ads.* Philip Allen and *als.* Citation.

68 I admit due service of a copy of the within citation.
Dated N. Y., March 25, 1862.

G. .T STRONG,
Att'y for Def'ts.

Filed March 25, 1862.

Filed October 11, 1862.

U. S. Supreme Court.

FREDERICK SCHUCHARDT and FREDERICK C. GEBHARD, Plaintiffs in Error, *vs.* PHILIP ALLEN, PHILIP ALLEN, Jr., and CHARLES B. ALLEN, Defendants in Error.	Record No. 159. Brief and Points of the Plaintiffs in Error.

This case comes up on a Writ of Error from a judgment of the Circuit Court of the United States, for the Southern District of New York. The action was brought by the defendants in error against the plaintiffs in error, to recover damages for an alleged breach of false warranty and deceit in the sale of one hundred casks of madder.

The declaration contains seven counts:

The 1st alleges that the plaintiffs bargained with the defendants to buy the madder, who, by "falsely and fraudulently warranting it to be a *prime article*," sold the same to the plaintiffs, whereas it was not such in fact, and so they "falsely and fraudulently deceived the plaintiffs," &c.

The 2d alleges that the defendants, by falsely and "fraudulently warranting the madder to be *pure and unadulterated*," sold the same to the plaintiffs, whereas it was not such, and so they "falsely and fraudulently deceived" the plaintiffs.

The 3d alleges that the defendants, by "falsely and fraudulently warranting the madder to be *good merchantable madder*," sold the same, whereas it was not such, and so they "falsely and fraudulently deceived" the plaintiffs.

The 4th, after stating that the plaintiffs were calico printers, and required and were accustomed to use Dutch madder, avers that the defendants, knowing this and that the madder was for use, "by falsely and fraudulently representing it to be *fit and proper for use*

in their business," sold the same, whereas it was not such, and so the defendants "deceived the plaintiffs."

The 5th, omitting the recital that the madder was for the plaintiffs' use, alleges that the defendants, "by falsely, fraudulently, and deceitfully pretending and representing" the madder to be "a *prime article*," sold the same, whereas it was not such, as they "knew at the time," and so they deceived the plaintiffs.

The 6th alleges that the defendants, by "falsely, fraudulently, and deceitfully pretending and representing" the madder to be "*pure and unadulterated*," sold the same, whereas it was not such, as they well knew, and so they deceived the plaintiffs.

The 7th alleges that the defendants, by "falsely, fraudulently, and deceitfully pretending and representing" the madder to be "*good merchantable Dutch madder*," sold the same, whereas it was not such, as they well knew, &c.

The defendants pleaded to the declaration, the general issue of *not guilty*.

The issues so joined were tried in the city of New York, before his Honor Mr. Justice Nelson and a jury, on the 25th May, 1859, and witnesses were examined and depositions read, establishing, in substance and effect, the following facts, viz.:

The madder in question was owned by Goll & Co., merchants in Amsterdam, Holland, who consigned the same to the defendants, as commission merchants residing in New York, for sale upon commission. The defendants had no interest therein beyond that of consignees for sale. (Rec., fol. 31.)

The vessel containing the madder arrived at New York from Rotterdam, on the 6th April, 1856, previous to which the defendants had received, by a Liverpool steamer, a sample put up in the usual way in a small clear glass bottle, with a ground glass stopper, covered with bladder, and marked 1 to 100 according to the number of casks. (Rec., fol. 31.)

The sample was handed to R. H. Green & Sons, who were regular brokers in drugs, &c., in the city of New York, to be sold, but with positive orders that the bottle must not be opened as it was the only sample received, and by opening it the air would come in contact with the madder and change its color. (Rec., fols. 17, 31.)

R. H. Green, one of the brokers who had the sample, having occasion to go to Providence, took the sample with him, and while there called upon the plaintiffs at their works and showed it to them, informing them, at the same time, of his instructions not to allow it to be opened, and stating, also, that he knew nothing about the madder. (Rec., fols. 19.)

The plaintiffs looked at the madder through the bottle, and they also called their overseer, a man of 45 years experience, to look at

it. He did so, and stated to them that while it looked fair yet he could not judge of its quality without opening the bottle and examining it, and that it could not be judged of in any other way. He further testified that madder is always taken out rubbed and examined, and he had never known of a purchase where it was not so examined, and that no wise man would buy without so looking at it. (Rec., fols. 26, 27.)

Without further or other examination, and without requiring the bottle to be opened, or any statement or assurance from the broker either as to the quality of sample or that the bulk should correspond therewith, and without any knowledge of the quality of the sample except as it appeared to the eye, the plaintiffs agreed verbally to purchase the lot at 11¼ cents a pound, deliverable to them in New York, and to be paid for by their notes at six months; and the brokers were requested to accept the delivery and to ship the same to them at Providence, as their agents in the matter. (Rec., fos. 19, 20.)

Upon his return to New York, the broker made an entry of the sale in their regular brokers' sales-book and sent a copy thereof to the defendants, which was in these words: "New York, April 17, 1856. Sold to Phillip Allen & Sons, on account of Schuchardt & Gebhard, 100 casks Dutch madder, at 11¼, 6 months oc, 1 to 100 per *Mississippi*. Randall H. Green & Sons." (Rec., fol. 20.) This was the first information the defendants had that the madder had been sold, and they did not then, nor until the day of the trial, know that the sale had been made elsewhere than in New York. (Rec., fol. 32.)

The *Mississippi*—the vessel by which the madder was imported—arrived, as before stated, on the 6th April, and before the broker went to Providence; and he says that upon his return to New York, he "immediately took possession of the madder *for the plaintiffs*" (Rec., fol. 22), but he, no doubt, intended to say that he took such possession as soon as it could be weighed and delivered. It had to be weighed to ascertain the quantity, and thus determine the amount for which the notes were to be given. (Rec., fol. 19.)

After the madder had been weighed, a bill was made out by the defendants, containing the weight and price thereof, which was handed to the plaintiffs' agents on the 25th April, and by them sent to their principals. This bill contained a notice in these words: "*No claim for deficiencies or imperfections allowed, unless made within seven days from receipt of the goods.*" (Rec., fol. 32.) The agents knew and at the time of sale, and of the receipt of such bill and notice, that the defendants were merely consignees of the madder for sale. (Rec., fol. 33.)

At this time the madder was upon the wharf in New York, where it had been for some time, and where it remained until the next day, when it was shipped on board of a vessel bound for Providence by the plaintiffs' agents, who received a bill of lading there-

for, stating such shipment, and that the same was deliverable to the plaintiffs on payment of freight. (Rec., fol. 24, Bill lading.) It reached Providence, and was received by the plaintiffs at their print works on the 8th May following. (Rec., fols. 25–26.)

Previous to its arrival, and on the 1st of May, the plaintiffs sent their notes for $17,998, the amount of the bill, to their agents in New York, who delivered them to the defendants.

On the 10th of the same month, the defendants made out and sent to Goll & Co. an account of the sale; and on the 14th, no claim having been made by or on behalf of the plaintiffs on account of the madder, they made up and sent an account current, remitted the proceeds of sale, and closed the consignment. (Rec., fol. 32.)

About three weeks after the madder was received by the plaintiffs at their print works, they commenced to use it, when they found, it not equal to what they had been accustomed to use. (Rec., fol. 26.) They thereupon, and on the 30th May, requested the brokers to send them the sample-bottle, which they did, and it was duly received by the plaintiffs at their print works, and thereafter retained by them. (Rec., fols. 20, 22, 25.) [It does not appear for what purpose they sent for the sample, but the inference is irresistible that it was to make a comparison between it and the bulk—as the same could not have been needed for any other purpose—nor does it appear from the evidence what was the result of such comparison, nor whether or not there was any difference between it and the bulk; from which it may be legally inferred, that there was no such difference.]

On the 6th of June thereafter, a correspondence occurred between the plaintiffs' agents and the defendants in regard to the quality of the madder, wherein the latter declined to do anything upon the subject without the authority of their principals, as they had already remitted to them the proceeds and closed the consignment. (Rec., fols. 20, 23.) And about the same time the agents received a box said to contain a sample of the 100 casks, (with instructions to have it analyzed by chemists); but there is no sufficient evidence showing how or with what accuracy such samples had been drawn. (Rec., fols. 24, 27.)

There are different qualities of madder, such as *mull*, *little ombro*, *ombro*, and *crops*, but they are all known by the common term of Dutch madder. The madder in question was neither represented or spoken of at the sale as of any particular quality, but simply as Dutch madder. (Rec., fol. 24.) The highest quality was worth at the time 14 cents a pound, and the *sample* was about a fourth grade. (Rec. fol. 33.) The chemists did not agree as to the quantity of impurities in the sample which they analyzed. (Rec. fol. 21.) All madder has in it more or less sand and other impurities. Even the first quality has in it from five to ten per cent. (Rec., fols. 27, 28.)

There was no evidence offered by the plaintiffs showing or tending to show the actual quality of the sample, although they had sent for and obtained the bottle, as before stated; nor was there any legal excuse for not furnishing such proof. The sample, which had never been returned to the defendants, had been retained by the brokers until it was called for, when it was forwarded to the plaintiffs, as before stated. (Rec., fols. 20, 24.) There was no evidence on the part of the plaintiffs showing or tending to show any standard of excellency by which the bulk could be compared, to see if there had been, in fact, any breach of warranty or any deceit. The only testimony upon the subject was that of the foreign witnesses, who testified not only how the sample in question had been originally drawn, but also that it had been fairly taken from the bulk. (Rec., fols. 35–39, 40, 50–51.)

The testimony being closed, the counsel for the defendants requested the Court to instruct the jury as follows:

1. The gist of the plaintiffs' action is an alleged false warranty and deceit on the part of the defendants in the sale of the madder in question; and to entitle them to recover against the defendants, they must establish, to the satisfaction of the jury, such alleged false warranty and deceit.

2. That in this form of action, the plaintiff cannot recover without evidence to establish a *scienter* on the part of the defendants.

3. That the broker had no authority or power to warrant that the bulk should correspond with the madder contained in the bottle, and thus bind the defendants. But even if he had such power, still he did not so warrant the same.

4. That there was not such a sale by sample as in law amounts to a warranty that the bulk should correspond with the sample.

5. That if there was any warranty, it was at most an implied one, under which the defendants are not liable for any adulteration of the bulk of the madder, unless the plaintiff have, by competent evidence, established fraud on the part of the defendant in respect thereto.

6. If there was a warranty of any kind, still the terms stated in the bill rendered limited the defendants' liability thereon to seven days, and is no demand for damages was made by the plaintiff within that time, they are not entitled to recover in this action.

The Court refused to give either of the instructions so prayed for, and the counsel for the defendants thereupon excepted.

During the trial the broker was asked by the plaintiffs' counsel what kind of madder he had been in the habit of selling the plaintiffs, to which the defendants counsel objected. The Court overruled the objection, and permitted the witness to answer, and counsel for the defendants excepted. (Rec. fol. 17.)

The jury rendered a verdict for the plaintiffs for $7,333, being a deduction of thirty per cent. from the price paid for the madder which reduced the same to 7⅓ cents per pound, and thereupon the defendants proposed their bill of exceptions. (Rec., fol. 16, 57.)

Points.

First.—The authority delegated to the broker was to sell the madder by a contract, which should be binding by the law of the State. Such a contract to be binding upon the principals must have been in writing. In view of this authority, the note of sale constituted the contract between the parties, and not the so-called bargain made in Rhode Island.

I.—In judgment of law the agent of a principal authorized to contract for him in reference to property in the State where both reside, must, in so doing, follow the law of such State, or his principal will not be bound.

Owings *v* Hull, 9 Peters' R., 607.
Horton *v.* Morgan, 19 New York R., 170.
Sutton *v.* Tatham, 10 Ad. & E. R., 27.
Story Confl. Laws, § 260, 286 b. 318.
Russell on Fac. & Brokers, p. 69.
Accebel v Levy 10 Bing. 376

If this were otherwise, the agent empowered to sell a cargo of madder or cotton in the city of New York, might, by going into a State where the civil law prevails, make a contract of sale without sample or warranty in fact, which would bind his principal to deliver articles of the best quality, and subject him to damages for a failure so to do.

No such authority can therefore be implied from an ordinary delegation of power to make a sale of property, situate where principal and broker both reside.

II.—If it be urged that here was a ratification of the R. I. contract, by the principals by delivering the property and receiving the consideration, the answer is, that such delivery and receipt are consistent with the terms of the sale note; and the proofs show that the vendors did not know that the broker had contracted elsewhere than in the city of New York, nor otherwise than by the usual brokers' note of the transaction, and therefore such ratification was invalid.

Owings *v.* Hull, 9 Peters' R., 607.
Nixon *v.* Palmer, 4 Seld. R., 398.
Seymour *v.* Wyckoff, 10 New York, R, 213.

III.—Therefore, as their note of sale contained no warranty, in judgment of law, none was made.

Randall *vs.* Rhodes, 1 Curtis U. S. C. R., 90.
Mumford *vs.* McPherson, 1 John. R., 414.
Wilson *vs.* Marsh, Id., 503.
Meyer *vs.* Everth, 4 Camp. (N. P.) R., 22,

Second.—If, however, the broker was authorized to make a contract which should, without writing, bind his principal according to the law of the State of Rhode Island (his agency being special and limited), he was not authorized to warrant that the madder to be sold was equal to that contained in the bottle exhibited, and of this the purchasers had notice at the time the article was offered to them.

I.—It appears from the uncontradicted testimony of all the witnesses, that madder is of several qualities; that all contains sand earthy matter and other impurities; and that in the best these are found to the extent of from 5 to 10 per cent. of the bulk or weight.

II.—It also appears from the testimony of McCarthy, a witness for the buyers, that the presence or quantity of these impurities could not be ascertained from an inspection of the sample in the bottle without opening it, and he so told his employers.

Thus we have notice to the buyers that the best and poorest of madder contains these impurities, and knowledge, also, that no one could tell by the inspection of the sample-bottle whether it contained the best or poorest.

III.—The buyers also had notice that the sellers declined to permit the bottle to be opened so as to allow of such an inspection as would enable them to ascertain from the sample what the bulk of the madder was to be; and from all this, it follows that the broker was not authorized, by means of the sample, to make any representation whatever of the quality of the article offered.

Under these circumstances, if the buyers wished to protect themselves by a warranty, they were bound so to have informed the broker that his principals might have exercised their own discretion on the subject, giving or withholding it as they should deem proper.

Parkinson *vs.* Lee, 2 East R., 314, 322.
Welsh *vs.* Carter, 1 Wend. R., 190.

Third.—Not only had the broker, for the reasons before stated, no authority to warrant the madder by representing it to be like the sample; but no such warranty was in fact made by him.

II.—The mere exhibition of the sample—the authorities are abundant to show—does not amount to a warranty that the bulk sold is like it. Representations or statements must accompany this, showing it to be the purpose of the seller to make, and of the buyer to rely upon the warranty.

Waring *vs.* Mason, 18 Wend., 425.
Hargous *vs.* Stone, 1 Seld. R., 73.
Beirne *vs.* Dord, Id., 95.
Hoe *vs.* Sanborn, 21 New York R., 552, 564.
Seixas *vs.* Wood, 2 Caine Rep., 48, 56.
Bradford *vs.* Manley, 13 Mass. R., 139, 145.
Torwell *vc,* Gatewood, 2 Scam., 22.
Ormrod v Huth 14 Mees & W. 651.

III.—In the present case, there was not even an exhibition of a sample within the meaning of the law, and no representation whatever that the bulk should conform to it.

To exhibit a sample, is so to show it that it is to be regarded as a representative of the bulk to be sold. In other words, the buyer examines the sample, as he would the bulk, if present; and in place of inspecting the whole, examines the part exhibited to show what the whole is; and when such an exhibition is accompanied with statements showing it to be the purpose of the seller to warrant the bulk equal to the sample, the buyer may rely upon this as a warranty; and if violated, he may recover as damages the difference between the value of the article exhibited and that delivered.

But in this case the sellers expressly declined to permit the madder in the bottle to be so examined that its quality could be determined, and therefore—as it was known to the buyers that whether it contained the best or poorest could not be ascertained without opening it—there was no measure of excellence known by either party to which a warranty could be applied, and therefore no agreement upon the subject.

Fourth.—If it should be urged that, although no express warranty was made, still that a warranty may be implied from the fact that the party buying had no opportunity to inspect the bulk, and therefore, might rely upon an implied warranty that it should be as good as the sample *appeared to be from looking at it*, the answer is:

I.—That the buyers were told by their experienced foreman, and no doubt themselves knew (and at all events were bound to know), that the appearance to the eye would not disclose any of the impurities known by all dealers in the article to exist in madder, even of the best quality. Hence, appearance to the eye cannot be separated from knowledge by the other senses; and therefore, when the eye looked the mind gave notice that imperfections existed which

I. The sale note or memorandum of sale made by the broker and entered in his sale book constituted the binding contract between the parties, which could not be varied by parol.

Story on Sales, § 87 and cases there cited.
Story on Agency, § 28, 108.
Merritt *v.* Clason, 12 J. R., 102.
Clason *v.* Bailey, 14 do., 484.
Peltier *v.* Collins, 3 Wend., 459.

the eye could not discover. Whilst, therefore, to the eye the madder looked fair, yet the ordinary dealer *knew* that it contained sand and other impurities; and that, although fair to look upon, it might be of the poorest quality to be found in the market. Moreover the law presumes every dealer in articles brought to market acquainted, with all the circumstances usually attendant upon such article.

Sands *v.* Taylor, 5 John R., 405.
Hilliard on Sales, p. 219, § 3.

Defects apparent or *known* at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud.

Margetson *v.* Wright, 7 Bing. R., 603.
2 Kent Com., p. 484.

II.—Again, the madder was delivered to the agent of the buyers in the city of New York, and was by them shipped from thence to their residence. They, therefore, had an opportunity before accepting to inspect it; and they or their agents possessed the sample with which it could have been compared. That such inspection would have been attended with labor and inconvenience is no excuse for not making it. If the purchasers wished to avoid such trouble and expense, they should have exacted an express warranty of quality.

Hart *v.* Wright, 17 Wend R., 275.
Hyatt *v.* Boyle, 5 Gill & John R., 110.
Waring *v.* Mason, 18 Wend, 440.
Carnochen *v.* Gould, 1 Bailey R., 179.

Hanson v Armyn 6 East 615.
McDonald v Hewett 13 J.R. 348 Rufus v Nicoll 3 Wend 112

III. And moreover, when an implied warranty is relied upon, it is submitted that the party seeking to recover upon it must aver and prove that the seller *knew* of the defect insisted upon. This was not proved, but, on the contrary, it appears from the proof and opinion of the Court, that the sellers were, in fact, guiltless of fraud, and had no such knowledge.

Dale's Case, Cro. Eliz., 44.
Chandelor *v.* Lopez, 2 Croke, 2; S. C., with notes, 1 Smith Lead. Cases (4 Am. Ed.), 207
Parkinson *v.* Lee, 2 East R., 314.
Hoe *v.* Sanborn, 21 New York R, 552.
Fraley *v.* Bispham, 10 Penn. R., 320.
Kingsbury *v.* Taylor, 29 Maine R., 508.
3 Lond. Law. Mag., p. 191, &c.
Emerton v Mathews 1 Am. Law Reg. (N.S) 231. S.C. 5 Law Times 681.

Fifth.—If it should be held upon the facts that a warranty existed, it is submitted that at the most it was but a warranty that the bulk should correspond with the *actual quality* of the sample produced; and this being so, it follows that there is a fatal variance between the contract as set forth and that proven

As the sample may, from the proof, have been of any quality—from the poorest to the best—the warranty could have been only, that the bulk ranged in quality between those degrees; and therefore, the delivery of any madder, merchantable within this range, would have satisfied the warranty.

Weall *v.* King, 12 East. R., 452.
Snell *v.* Moses, 1 John. R., 96.
Perry *v.* Aaron, Id., 129.
Story on Sales, Sec. 368
Gardner v Gray 4 Camp. 144
Fraley v Bispham 10 (Barr) Pa. R. 320

Sixth.—In view of the foregoing propositions, it is clear, that if a warranty of any kind was made, the plaintiffs were not entitled to recover—for there was no evidence to show what was the actual quality or value of the sample exhibited.

The only evidence on this subject is the opinion of McCarthy, that it was impossible to say anything about its quality. There is, therefore, no proof that the madder sold was not equal to the sample. Indeed, the rule of damages was assumed to be the difference, not between the value of the sample and bulk, but between the bulk and the very best quality of madder known.

And this rule was adopted, not in view of the fact that the sellers had withheld or concealed the sample. This was not alleged or proved; on the contrary, the testimony shows that from the time it was first delivered to the broker it was never returned to them. Moreover, it was proved by the broker to have been forwarded by him to the buyers, at their request, and after they had ascertained the character of the bulk by using from it. It must be presumed therefore, that they sent for the sample to compare it with the bulk delivered. If they did so compare it, they had the means of showing whether it was of like quality or not; and as they have proved no difference between the two, and as the burden of this proof was upon them, it is to be inferred they were alike; and especially so, in view of the uncontradicted testimony of the foreign witnesses, who swear positively that the sample sent here was fairly drawn from the bulk abroad.

"The party who extinguishes the light, and precludes the other party from the means of ascertaining the truth, ought to bear the loss."

It is manifest, therefore, from the rule of damages adopted, that the Court below considered the warranty to have been established,

not that the bulk should, in fact, correspond with the sample exhibited.

Hopkins *v.* Appleby, 1 Starkie R., 477.

Seventh.—Even if the purchaser had not, in judgment of law, an opportunity to inspect the bulk at the time the contract was made in Rhode Island, yet they had ample opportunity, and it was entirely practicable to do so, while it was in New York before its delivery. At all events, they should have made such examination promptly after it was received at their print works, and within the time specified in the notice, and communicated the result to the defendants. Their neglect to do this operated to discharge the implied warranty, or, in other words, it estops the plaintiffs from insisting that the bulk did not so correspond.

Vanderhorst *vs.* McTaggart, 1 Bay R., 269.
Muller *vs.* Eno, 3 Duer Rep., 421, 425.
Wilson *vs.* Woodhull, cited in 3 Cow., Hill & Edwards' Notes on Phil. Ev., p. 382.
Prosser *vs.* Hooper, 1 Moore R., 106.
Hargous v Stone 1 Seld. 86.

Eighth.—The plaintiffs, having failed to prove an express warranty, were not entitled to recover upon either count of the declaration without proving the defendants' *scienter* that the bulk was unlike the sample, or such facts as would constitute *moral fraud* upon their part.

I.—Such proof was necessary to support either of the last four counts, which are clearly founded upon *deceit*. They do not contain any words of warranty, but allege that the defendants knowingly deceived the plaintiffs in the sale of the madder.

Ormrod *vs.* Huth, 14 Mees. & W., 651.
Moens *vs.* Heyworth, 10 Ib., 147.
Freeman *vs.* Baker, 5 Barn. & Ad., 797.

II.—And having failed to prove any express warranty, to maintain the first three counts on the ground of any *implied* warranty, the plaintiffs were bound, as before stated, to prove such *scienter*.

Cases cited under 3d Sub. Point, p. 9.

Ninth.—The Court erred in allowing the question to be put to the witness, as to what kind of madder he had been in the habit of selling the plaintiff.

The defendants had never sold the plaintiffs any madder before the lot in question, and there is no evidence that they knew what kind of the plaintiffs had been accustomed to use.

Tenth.—It is respectfully submitted that there was error committed upon the trial of the cause, in respect to the matters before stated, and therefore the judgment should be reversed, and a new trial ordered.

EDWARD H. OWEN, and
E. W. STOUGHTON,
Counsel for the Plffs. in Error.

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty, N. Y.

In the Supreme Court,

OF THE UNITED STATES.

Frederick Schuchardt and Frederick C. Gebhard,
Plaintiffs in Error.

v.

Philip Allen, Philip Allen, Junior, and Charles B. Allen,
Defendants in Error.

Abstract and Points.

On the part of the Defendants in Error.

This was an action on the case for false warranty, and for deceit in the sale of one hundred casks of Dutch madder.

The declaration contained seven counts.

The first three were for false warranty (without any *scienter*;)

1st. That it was a prime article;

2d. That it was pure and unadulterated;

3d. That it was good, merchantable Dutch madder.

The last three counts were for deceitful representations (with *scienter*;)

1st. That it was a prime article;

2d. That it was pure and unadulterated;

3d. That it was good, merchantable Dutch madder.

In the fourth count, it was averred that the plaintiffs carried on and were engaged in the business of calico printers, and as such, required for their use, and were accustomed to use in their business Dutch madder, and that the defendants by falsely, &c., representing it to be fit and proper for use in said business, and well knowing that it was bought by them for use in their business, &c., sold it to the plaintiffs, &c.

The defendants pleaded not guilty to the whole declaration.

The cause was tried before Mr. Justice Nelson, at a Circuit Court, in the city of New York, on the 25th day of May, 1859, and a verdict was rendered in favor of the plaintiffs for $7,333.

On the trial, the defendants excepted to the decision of the judge, allowing a question to a witness which was asked by the plaintiffs' counsel (fol. 17, 18); and also, to his decision refusing to receive evidence offered by the defendants' counsel (fol. 33.)

The defendants' counsel excepted, also, to the refusal of the judge to give certain instructions to the jury (fol. 54, 55.)

These exceptions raise the questions which the Court will be asked to consider.

The following facts are gathered from the evidence stated in the bill of exceptions.

I. Mr. Randall H. Greene, as the agent of the plaintiffs in error (having been employed by them to do so), made an agreement at Providence, in the State of Rhode Island, with the defendants in error, for the sale to them of one hundred casks of madder, at 11¼ cents per pound (fol. 17, 18, 21, 31.)

This agreement, although verbal, was a full and final agreement for such sale.

II. It was a sale by sample.

The madder was not present; it was not within the State; the defendants in error did not see it, and had no opportunity to examine it. (Fol. 18.)

Mr. Greene called on them and showed them a sample bottle of madder, "said to represent these one hundred casks" (fol 18), which the plaintiffs had sent to him to find a purchaser for the lot (fol. 31); and the only means which the defendants in error had of judging of the quality of the madder, and on which they relied, was this sample bottle.

Mr. Allen, junior, one of the defendants in error, went with Mr. Greene to their works, to see their overseer; *the bottle was submitted to him*, and then the bargain was concluded.

A brief extract or two from the testimony will show clearly that this was a sale by sample:

Mr. Frederick Schuchardt, one of the plaintiffs in error testified as follows: "On the 31st March, we received by steamer, from Liverpool, a sample of madder, in a glass bottle"—"on receipt of the bottle, we *sent it* by one of our clerks to Mr. Greene, a broker in this city, *to find a purchaser for the lot*, which is the usual course." (Fol. 31.)

Mr. Greene's testimony on the subject is as follows: "I received from a young man, in the employ of the defendants, a small bottle of madder, marked 1 to 100, *said to represent* one hundred casks of madder, *with the injunction that it must not be opened:* he left it with me" (fol. 18)—"the ship containing the madder had not arrived when the bottle was first brought to me" (fol. 19) [it arrived in New York from Rotterdam on 6th April, 1856, (fol. 31)]—"the vessel with the madder was here, and as they were urgent to have it taken from the wharf, and as I was about going Eastward, I said I would try and sell it, but *still I was told not to have it opened;* it was *very handsome to look at;* I went to Providence, and called on the Allens;

young Allen went with me to the works; *he wanted to see his overseer;* we met his overseer (Mr. McCarty) and the *bottle was submitted to him;* he thought it *was handsome;* and the conclusion was they agreed to take it; the price was named; in all other cases within my knowledge, there was a sample bottle for every cask; *the conversation carried the idea that it was very handsome madder;* the price named was 11¼ cents a pound for the 100 casks, without knowing the amount in them; he said he would take it, and I said he should have it; the bottle was not opened; *my orders were not to open it.*" (Fols. 18, 19.)

The madder was then in New York; the vessel containing it was discharging. (Fol. 32.)

III. The defendants in error, who are calico printers, purchased the madder for use in their print works, and not for traffic or sale. This was known to Mr. Greene, at the time of sale. (Fols. 17, 18, 25, 26, 27.)

IV. Under this agreement one hundred casks of madder (so called) were afterwards sent from New York to the defendants in error (fols. 19, 20, 24, 25), who sent it up to their print works (fols. 25, 26), and sent their notes for it to Mr. Greene. (Fol. 20.)

V. About three or four weeks afterwards it was opened. On opening it, it was found to be "*full of sand.*" "*They were obliged to shovel the sand out of the vats twice a day.*" The quantity of sand "*varied from two and a half ounces to four ounces in the pound;*" "this variation took place in the same cask." Sand was found "in *streaks*" in it; it was "*streaked through and through with sand*" (fol. 26); "*the streaks were both lengthwise and crosswise;*" "*they were strata.*" (Fol. 27.)

VI. The article sent to defendants in error did not correspond with the sample. That was "*very fair to look at*" (fols. 18, 26); it appeared "*to be very handsome madder.*" (Fols. 18–28.) "*There was no sand in the bottle apparent*

to the eye;" "no one could have discovered the adulteration from looking at the madder in the bottle" (fol. 27); but, as to the article sent, "*it was palpable, as soon as it was opened, that it was full of sand*"—"streaked through and through with sand" (fol. 26); "both lengthwise and crosswise." (Fol. 27.)

VII. The defendants in error forthwith gave notice to the plaintiffs in error of the adulteration, and asked them how to return it; they sent samples of it. (Fol. 20.)

The plaintiffs in error declined to have anything to do with it, on the ground that they had sold it as agents, and had remitted the proceeds to their principals. (Fol. 20, 21.) They had subsequent transactions with these principals, and made advances to them. (Fol. 34.) They did not dispute its being adulterated.

VIII. But they suggested that the madder had better be analysed (fol. 33); and accordingly, although such analysis was unnecessary, as the adulteration was quite palpable and gross (fols. 26, 27), the defendants in error procured analyses from four separate analytical chemists, who found that it contained from 30 to 40 per cent. of sand and earthy matter. (Fol. 28, 29.)

IX. At the time of the sale they had not disclosed the fact of their being agents.

X. The plaintiffs in error rejected a proposition of the defendants in error to refer the matter to arbitration. (Fol. 21.)

XI. The article so sent to the defendants in error was not a merchantable article, but base, unfit for use, utterly unmerchantable, and grossly adulterated. (Fols. 26, 27, 28, 29, 30.)

Points.

I.

On the examination of Mr. Greene, (the broker,) he was asked by the plaintiffs' counsel what kind of madder he had been in the habit of selling the plaintiffs. To this question the defendants' counsel objected, the judge overruled the objection, and the defendants counsel excepted. (Fol. 17, 18.)

1. There was no error in allowing the question.

The answer might have tended to prove the allegations contained in the declaration; especially those in the fourth count, that it was bought by them, as the defendants well knew, for the purpose of being used in their business, and that it was not fit for that purpose. It was of course proper to show what kind or quality of madder they wanted for that purpose, and what knowledge the agent of the defendants had on the subject.

Evidence is admissible "if it *tends* to prove the issue or "constitute a link in the chain of proof; although, alone, "it might not justify a verdict in accordance with it." Greenl. on Evi. § 51 *a* (10th ed.) and cases there cited.

The admission of the question was within the limits of judicial discretion.

2. Moreover, the question was not answered; and, therefore, the exception should be disregarded.

II.

The counsel for the plaintiffs in error offered to prove that *all* articles of merchandise sold by the wholesale are disposed of by exhibiting specimens as samples, and when

brokers are employed, samples of *all* articles bought and sold are delivered to be exhibited; which evidence was, on objection, excluded by the Court; to which ruling an exception was taken by the counsel for the plaintiffs in error.

There was no error in disallowing the evidence thus offered by the plaintiffs in error.

Fol. 33.

1. It would not have proved or disproved any of the issues in the case.

2. It did not relate to them. It was irrelevant, and comes within the rule stated by a writer on evidence, as follows:

"This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it." (1 Greenl. on Ev., 10th ed., §§ 52, 448.)

3. The offer was not to prove an usage in a particular trade, or at a particular place, but what was done *universally* in sales by wholesale: done by *all* persons at *all* times, in *all* places; and universally in *all* sales by brokers.

It is obvious from the nature of things that no witness and no number of witnesses could prove such a fact, and that if the Court were to enter upon such an enquiry, no assignable limits could be set to the extent of the investigation, the number of witnesses, or the duration of the trial; and that it must be presumed that if such an universal fact existed, the jury would themselves know it; and therefore such proof could be neither proper nor necessary.

4. The evidence, if received, could not have tended to prove any of the issues in favor of the plaintiffs in error; the rejection of the evidence could not have been injurious to them.

5. The rejection of the evidence was within the limits of judicial discretion.

III.

The counsel for the plaintiffs in error prayed the Court to instruct the jury that the gist of the action was false warranty *and* deceit, and that such false warranty *and* deceit must be established to the satisfaction of the jury; and to the refusal of the Court to give this instruction they took an exception. (Fol. 54.)

It was not necessary for the defendants in error to establish the facts of false warranty *and* deceit, as claimed by the plaintiffs in error. It was sufficient either to prove a false warranty without deceit, *or* deceit without false warrranty. It was not necessary to prove both.

Vail *v.* Strong, 10 Verm. R., 457, 462.

Brown *v.* Edginton, 2 Mann. & Gran., 279.

And see the authorities cited under the next point.

IV.

Exception was also taken to the refusal of the Court to instruct the jury that in this form of action the plaintiffs cannot recover without evidence to establish a *scienter* on the part of the defendants. (Fol. 54.)

This exception was not well taken.

In this form of action a plaintiff can recover upon a warranty without averment or proof of *scienter*. It need not be averred; if averred, it need not be proved.

That this has always been the doctrine and practice of the Courts was shown clearly by Lord Ellenborough in his elaborate exposition of the law in the case of

Williamson *v.* Allison, 2 East. R., 446.

See also—Gresham *v.* Postan, 2 C. & R., 540.

(decision by Best, C. J.)

Similar decisions have been made repeatedly in this country.

Beeman *v.* Buck, 3 Vermt. R., 53.
Osgood *v.* Lewis, 2 Har. & Gill R., 495.
Holman *v.* Lord, 12 Barb. R., 336.
Vail *v.* Strong, 10 Vermt. R., 457, 462.
Massie *v.* Crawford, 3 T. B. Monr. R., 218, 220.
House *v.* Fort, 4 Blackf. R., 293.
Blanton *v.* Wall, 4 Jones, (N. C.) Law R., 532.
In Lassiter *v.* Ward, 11 Ired. Law R., 443,

The Court refer to the case of Williamson *v.* Allison, *supra*, and say: "It is nearly half a century since the decision, and during that period the point has been considered as at rest, and many actions have been brought in tort as well as *ex contractu* on false warranties."

In Trice *v.* Cockran, 8 Gratt. R., 449, the Court say: "A *scienter* or knowledge of the defendant of unsoundness is immaterial and need not be alleged in the declaration, nor if alleged need it be proved. This is the firmly established doctrine of the Courts, both in England and in this country, ever since its adjudication in Williamson *v.* Allison, 2 East. R., 446."

V.

The counsel for the plaintiffs in error prayed the Court to instruct the jury that the broker had no authority to warrant that the bulk should correspond with the sample; and that he did not so warrant the same; and to the refusal of the Court to give this instruction they excepted. (Fol. 54.)

1. There was competent evidence for the jury, tending to show that Mr. Greene, the broker, was authorized to enter into the agreement which he made with the defendants in error, with all its incidents, and that this agreement did

contain a warranty that the bulk should correspond with the sample.

Andrews *v.* Kneeland, 6 Cow. R., 354.
The Monte Allegro, 9 Wheat. R., 644; cited 6 Cow. R., 358.
Gallagher *v.* Waring, 9 Wend, R., 26.
Boorman *v.* Johnson, 12 Wend, R., 566; and see the other cases cited under the next point.
Williams *v.* Spafford, 8 Pick. R., 250.

2. The verbal agreement which he made was valid and complete.

The law of Rhode Island did not require that such agreement or any note or any memorandum of it should be in writing.

The agreement was complete and binding upon both of the parties, as soon as they had communicated to each other their assent to it.

Mactier *v.* Frith, 6 Wend. R., 103.

VI.

An exception was taken to the refusal of the Judge to instruct the jury, that this was not such a sale by sample as amounts to a warranty, that the bulk should correspond with the sample. (Fol. 54.)

There was competent evidence for the jury, to show that this was a sale by sample: or, in other words, a warranty that the bulk should correspond with the sample.

See the Statement of Facts, *supra*, No. II., pp, 3, 4.

In the language of the Court below, "the sale of the madder was a sale by sample, where the purchaser had no opportunity to examine the bulk, and where he was prohibited by the vendors from opening the sample bottle for the purpose of examining the article; by which act

they assumed the responsibility of maintaining that the bulk was equal to the quality of the article as it appeared to the eye in the bottle. The sale was not only by sample but was obviously intended to be such by the vendors, as the sample of the madder preceded the arrival of the bulk from abroad, and no sample accompanied it. The sample thus previously forwarded was put into the hands of the broker to sell the one hundred barrels previously shipped. This sample, thus forwarded, was the only one furnished representing this quantity of madder."

And see the statement of facts, *supra*, No. II. pp., 3, 4.

It may in a word be asked, for what possible object the bottle was sent to the broker to find a purchaser, or was exhibited by him when the article could not be examined, if it were not intended to be a representation that it was a sample of the madder?

Even according to the decisions in the State of New York, where the doctrine of *caveat emptor* has been carried to an extreme not generally adopted, there was competent evidence of a sale by sample, and, therefore, it was for the jury to determine whether there was such a sale.

Boorman *v.* Johnson, 12 Wend. R., 566.
Beebee *v.* Robert, 12 Wend. R., 413.
Gallagher *v.* Waring, 9 Wend. R., 20.
S. C., *nom.* Waring *v.* Mason, 18 do., 425, 433, 434.
Whitney *v.* Sutton, 10 do., 413.
Cook *v.* Mosely, 13 do., 277.
Hargous *v.* Stone, 1 Seld. R., 84–85.
Chapman *v.* Maule, 19 J. R., 290.
Roberts *v.* Morgan, 2 Cow. R., 438.
Duffie *v.* Mason, 8 do., 25.
Oneida Manuf. Co. *v.* Lawrence, 4 do., 440.

And see—

Osgood *v.* Lewis, 2 Har. & Gill. R., 518.
Morrill *v.* Wallace, 9 N. H. R., 111.
Baum *v.* Stevens, 2 Ired. Law R., 411.

There certainly was evidence to go the jury of a sale by sample.

VIII.

The Judge was requested to charge that, if there was any warranty, it was at most an implied one, under which the defendants were not liable for any adulteration of the bulk of the madder, unless the plaintiffs had established, by competent evidence, fraud in respect thereto, on the part of the defendants; and to his refusal the defendants excepted. (Fol. 55.)

The exception was not well taken.

1. As the agreement was oral, it was for the jury to determine whether there was any warranty; and if they, from the circumstances, came to the conclusion that there was a warranty, it would not be an implied warranty. In other words, the fact that there was a warranty might be inferred from circumstances; and, in such a case, there is no distinction in law between that and a warranty made in the most express language, and the most formal manner.

Osgood *v.* Lewis, 2 Har. & Gill. R., 518.
Brown *v.* Edgerton, 2 Mann. & Gran. R., 379.

"An implied contract only differs from an express contract, in the mode of proof; both equally proceed upon the mutual agreement of the parties, and cannot exist without it. If the agreement be formally and verbally stated the contract is express; if it is inferred from the acts of the parties, or the circumstances of the case, it is implied."

Story on sales, 229.

No particular phraseology is necessary to constitute a warranty.

Oneida Manuf. Co. *v.* Lawrence, 4 Cow., 440.
Roberts *v.* Morgan, 2 do., 438.
Chapman *v.* Mruch, 19 J. R., 290.
Whitney *v.* Sutton, 10 Wend. R., 411.
Cook *v.* Mosely, 13 do., 277.
Chisholm *v.* Gadsden, 1 Strob. Law R., 220.
Kinley *v.* Fitzpatrick, 4 How. Miss. R., 59.
Morrill *v.* Wallace, 9 N. H. R., 111.
McGregor *v.* Penn, 9 Yerg. R., 74.

2. A plaintiff can recover in case of an implied warranty without proof of fraud on the part of the defendant. He has a right to recover in an action on the case for a false warranty in any case in which he would have a right to recover in an action of assumpsit.

See the authorities cited *supra*, Point IV.

There was no error in the refusal of the Judge to give the instruction prayed on this point. (Fol. 55.)

VIII.

The judge was requested to instruct the jury that if there was a warranty of any kind, the terms stated in the bill rendered, limited them to seven days; and if no demand for damages was made by the plaintiffs within that time, then they were not entitled to recover in this action; and to his refusal the defendants excepted. (Fol. 55.)

This exception was not well taken.

The liability of the plaintiffs in error was not limited to seven days by the bill of parcels said to have been rendered by them.

1. Their liability was fixed by the warranty at the sale and was unlimited.

The bill was not rendered until some days afterward, and could not alter the contract between the parties, or limit the liability of the plaintiffs in error.

The contract was complete and binding upon both parties before this bill was delivered.

And see—

Bradford *v.* Manly, 13 Mass. R., 139.
Story on Sales (3d Ed.), § 356, and cases there cited; and
1 Cow. and Hill., notes to Phil. Ev., 195.
1 Green. Ev. (10th Edn.), s. 198 (n. 5·)
Fairlee *v.* Denton, 3 C. & P., 103.
Anthoine *v.* Coit, 2 Hall R., 40.
Commonwealth *v.* Eastman, 1 Cush, R., 189, 206, 215.

2. The limitation mentioned in that bill of parcels related merely to deficiencies and imperfections—not to adulterations.

Such a limitation is to be construed strictly.

3. Time is not essential in such cases.

All that could be required was a notice within a reasonable time.

IX.

It is submitted that none of the exceptions were well taken, and that the judgment, therefore, should be affirmed, with costs.

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Of Counsel for the Defendants in Error.